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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN COLLEGE OF PHYSICIANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether income derived by a tax-exempt medical association from the sale of commercial advertising space in its monthly journal is "unrelated business income" subject to tax under Sections 511 through 513 of the Internal Revenue Code.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 743 F.2d 1570. The opinion of the Claims Court (App., *infra*, 24a-33a) is reported at 3 Cl. Ct. 531.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a) was entered on September 17, 1984. A timely petition for rehearing was denied on December 5, 1984 (App., *infra*, 23a). On February 26, 1985, the Chief Justice extended the time within which to petition for a writ of certiorari to and including May 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 501, 511, 512, and 513 of the Internal Revenue Code of 1954 (26 U.S.C.), and of Sections 1.512 and 1.513 of the Treasury Regulations on Income Tax (26 C.F.R.), are set out in a statutory appendix (App., *infra*, 35a-54a).

STATEMENT

1. The basic facts were stipulated below (C.A. App. 18A-22A). The American College of Physicians is an association exempt from tax under Section 501 (c) (3) of the Internal Revenue Code.[1] Its main purposes are to uphold high standards of medical education and practice and to encourage medical research (App., *infra*, 24a-25a). Membership in the College is open only to those engaged in practice, teaching, research, or other professional activities in the field of internal medicine (*id.* at 2a). Respondent had approximately 32,000 members in 1975 (C.A. App. 19A).

In furtherance of its tax-exempt educational purposes, respondent publishes a monthly journal entitled *Annals of Internal Medicine*. The journal contains scholarly articles relevant to the practice of internal medicine and is highly regarded in its field (App., *infra*, 2a). The journal is provided to respondent's dues-paying members without charge and to nonmembers on a per-issue basis or by subscription (*id.* at 25a). Its circulation in 1975 was roughly 73,000 (*id.* at 3a). Each issue contains commercial advertisements (including classified ads) relating to medical services and products, primarily drugs (*id.* at 25a).

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax year at issue (the Code or I.R.C.).

It is respondent's policy to limit its advertising to those products and services that are useful in the practice of internal medicine (*id.* at 3a). Proffered advertisements are screened as to subject matter and as to the accuracy of their content (*ibid.*).

Many of the advertisements appearing in *Annals* are identical with those appearing in medical journals published by taxable commercial publishers, such as the *American Journal of Medicine*, which is put out by a division of Dun and Bradstreet (App., *infra*, 28a; C.A. App. 21A).[2] Some of the advertisements are eye-catching, others strictly factual; some cover a fraction of a page, others several pages; some are in black and white, many in bright color (App., *infra*, 28a). The advertisements are not dispersed throughout the journal but rather are grouped in discrete "stacks" at the beginning and end of each issue; the same format is generally followed in medical journals published by taxable commercial publishers (*id.* at 3a). The advertisements are deleted when the *Annals* are permanently bound.

The advertisements appearing in *Annals* are prepared by the advertisers and not by respondent (App., *infra*, 3a). Some of the ads are for established drugs and devices and are repeated from month to month (*id.* at 28a) No effort is made to coordinate the advertising with the journal's editorial content; thus, it would be coincidental for a drug that is discussed in an article to be featured in an advertisement in the same issue (*id.* at 28a n.3). Advertising space is made available at rates competitive with

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[2] Selected advertisements appearing in *Annals of Internal Medicine* and in *American Journal of Medicine* during January and February 1975 are reproduced in the appendix (App., *infra*, 55a-75a).

those charged for advertising space in other medical journals, whether published by taxable or tax-exempt entities (*id.* at 3a). According to a policy statement appearing in the July 1977 issue of *Annals*, what "justifies the incorporation of drug advertising in this journal" is the need to obtain "the financial support of drug houses" (C.A. App. 71A). Thus, it is an important source of revenue to respondent.

2. Sections 511 through 513 of the Code impose a tax on the "unrelated business income" of otherwise tax-exempt organizations like respondent. An "unrelated trade or business" is one the conduct of which "is not substantially related * * * to" (I.R.C. § 513(a)), *i.e.*, does not "contribute importantly to" (Treas. Reg. § 1.513-1(d)(2)), the accomplishment of the organization's charitable purposes. Section 513(c), entitled "Advertising, Etc., Activities," provides that an activity, such as advertising, which bears the earmarks of an unrelated trade or business "does not lose identity as [such] merely because it is carried on within * * * a larger complex of other endeavors," such as educational endeavors, that reflect an organization's tax-exempt function. The Treasury Regulations generally provide that "amounts realized by an exempt organization from the sale of advertising in a periodical constitute gross income from an unrelated trade or business" (Treas. Reg. § 1.512(a)-1(f)(1)).

Respondent's gross advertising revenue from *Annals* in 1975 was $1,376,322 (App., *infra*, 3a). After taking into account allowable offsets and deductions, respondent reported "unrelated business taxable income" of $153,388 on its 1975 tax return (*id.* at 4a). Respondent timely filed that return and

paid unrelated business income tax of $55,965 for that year (*ibid.*).

On June 12, 1979, respondent filed an administrative claim for refund of the tax thus paid (App., *infra*, 4a). When the IRS demurred, respondent, on August 17, 1982, instituted this refund suit in the Claims Court (*ibid.*). Respondent's principal contention was that its solicitation and publication of commercial advertising was "substantially related" to the performance of its educational purposes because "the advertising contains factual and technical data which * * * can help physicians keep up" with recent developments in medicine (*id.* at 27a-28a).

Following a trial, the Claims Court (Kozinski, C.J.) entered judgment for the United States. The court found respondent's principal argument—that the advertising in *Annals* "performs an educational function, supplementing the journal's editorial content" —to be "unpersuasive" (App., *infra*, 27a-28a). To begin with, the court noted, the "evidence is clear that [respondent] did not use the advertising to provide its readers a comprehensive or systematic presentation of any aspect of the goods or services publicized" (*id.* at 28a (footnote omitted)). Rather, "the comprehensiveness and content of the advertising package [was] entirely dependent on each manufacturer's willingness to pay for space and the imagination of its advertising agency" (*id.* at 30a). The advertising, moreover, was "typical commercial publicity" (*id.* at 28a). "Many ads were identical to those appearing in medical journals published by nonexempt organizations," any differences in format reflecting "the advertiser's marketing strategy rather than their probable importance to the reader" (*id.* at 28a-29a). Some of the advertising, the court observed, was for well-known and established products

like Valium, Insulin, and Maalox, a fact that "undermin[ed] the suggestion that the advertising was principally designed to alert readers of recent developments" (*id.* at 28a & n.4).

After thus evaluating the facts, the court noted that the Treasury Regulations provide that "advertising income of journals like *Annals* generally is taxable" (App., *infra*, 29a, citing Treas. Reg. § 1.512 (a)-1(f)). In holding that respondent's advertisements fall within this general rule, the court relied particularly on an Example set forth in the Regulations that "closely resembles the situation here" (App., *infra*, at 29a). That Example, involving a tax-exempt publisher of a professional journal, concludes that "the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute" (Treas. Reg. § 1.513-1(d)(4)(iv)(Example 7)). The court found that respondent's advertising package served no "identifiable educational objective that goes substantially beyond the informational content" necessarily possessed by any advertising, that any educational function that the advertising may have served "was incidental to its purpose of raising revenue," and hence that "the advertising in *Annals* did not contribute importantly to the College's tax-exempt purposes" (App., *infra*, 30a).[3]

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[3] The Claims Court also rejected (App., *infra*, 30a-34a) respondent's alternative contention that its product advertising was carried on "primarily for the convenience of its members" and was exempt from unrelated business income tax on that basis. See I.R.C. § 513(a)(2). The Federal Circuit upheld the Claims Court's findings in this respect (App., *infra*, 19a) and we have no occasion to address that alternative contention here.

3. The Court of Appeals for the Federal Circuit reversed (App., *infra*, 1a-21a). Rejecting the trial court's findings, it concluded that the advertising in *Annals* contributes importantly to the accomplishment of respondent's educational purposes by "appris[ing] internists of developments in their field" (*id.* at 19a).

The court turned first to the legislative history accompanying Congress's enactment (in 1969) of Section 513(c), which, as noted above, is entitled "Advertising, Etc., Activities." While acknowledging language in the committee reports suggesting that Congress "may have believed that advertising income should be taxed," the court dismissed this legislative history on the ground that it "addresses advertising generally and does not grapple with specific factual situations" (App., *infra*, 12a-13a). As the court read the legislative history, Congress did not intend to "adopt a blanket rule" that commercial advertising revenues should be taxed, but rather left to the courts a case-by-case, ad-by-ad determination about whether or not particular advertisements are "substantially related" to an entity's tax-exempt function (*id.* at 17a-19a & n.23).

The court of appeals agreed with the Claims Court that the "primary purpose" of respondent's advertising was commercial and that its "educational function * * * may well have been secondary to the purpose of raising revenues" (App., *infra*, 19a). The court held, however, that "[t]he commercial character of the activity is not * * * determinative" (*id.* at 16a), and concluded that the trial judge, "apparently distracted by the commercial character of the advertisements," had erroneously evaluated them under "a more rigorous standard than is supported

by the statute" (*id.* at 16a, 18a). The court of appeals did not discuss, or even mention, the Treasury Regulations upon which the Claims Court had based its decision. Rather, relying on testimony of respondent's expert witnesses that the trier of fact had found "unpersuasive" (*id.* at 16a-17a, 28a), the court of appeals concluded that "the sales of advertising in *Annals* are substantially related to the exempt purpose of the College to educate internists" and that the Claims Court's conclusion to the contrary was "clearly erroneous" (*id.* at 19a).

The government's petition for rehearing, with suggestion for rehearing en banc, was denied (App., *infra*, 23a).

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of federal tax law in a way that conflicts directly with Congress's clearly-expressed intent in enacting Section 513(c). The decision below grants an exempt professional organization the very competitive edge over its taxpaying commercial counterparts that Congress was at pains to deny when it amended the Code specifically to bring advertising revenues within the reach of the unrelated business income tax. The decision below sub silentio invalidates long-standing Treasury Regulations that Congress considered in 1969 and upon which it placed its explicit imprimatur. The court of appeals' open-ended construction of the statutory phrase "substantially related" has considerable administrative importance: it will pave the way for many hundreds of trade and professional organizations to escape tax on their advertising income, and will impose tremendous burdens on limited IRS audit resources. The Claims Court is a court of

nationwide jurisdiction—any taxpayer can have its case heard there, with review in the Federal Circuit, simply by filing a refund suit—and the decision below is thus likely to be uncontradicted unless certiorari is granted. Review by this Court is therefore appropriate at this time.

1.a. The unrelated business income tax has its genesis in the Revenue Act of 1950, ch. 994, 64 Stat. 906 *et seq.* Before that law was enacted, charitable organizations that carried on ordinary trades or businesses were able to escape tax on their profits on the theory that the charitable "destination" of the revenues took precedence over their commercial "source." Thus, a nationwide vendor of macaroni (*C.F. Mueller Co.* v. *Commissioner*, 190 F.2d 120 (3d Cir. 1951)), and a commercial bathing beach facility (*Roche's Beach, Inc.* v. *Commissioner*, 96 F.2d 776 (2d Cir. 1938)), successfully claimed tax-exempt status simply because their business profits went to charity.

In the Revenue Act of 1950, Congress responded to this problem in two ways. First, it enacted the so-called "anti-feeder" provision (I.R.C. § 502(a)), under which organizations "operated for the primary purpose of carrying on a trade or business for profit" cannot claim tax exemption solely on the ground that their profits go to charity. Second, Congress enacted the "unrelated business income tax," now codified in Sections 511 through 515 of the Code. Those provisions generally require organizations that otherwise qualify for tax exemption to pay tax at regular corporate rates on income derived from any trade or business "the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits

derived) to the exercise or performance by such organization of its charitable, educational, or other [tax-exempt] purpose" (I.R.C. § 513(a)).

The chief impetus behind the new tax was Congress's desire to put the business operations of tax-exempt organizations on an equal footing with those of their taxable commercial counterparts. The House Report stated that "[t]he problem at which the tax on unrelated business income is directed * * * is primarily that of unfair competition." H.R. Rep. 2319, 81st Cong., 2d Sess. 36 (1950). The tax falls on business revenues, not on membership dues or investment income, since Congress regarded such sources of income as a traditional and proper mainstay for charitable institutions. S. Rep. 2375, 81st Cong., 2d Sess. 30-31 (1950). As amended by Congress in 1950, the Code "does not deny [a tax] exemption where the organizations are carrying on unrelated active business enterprises, or require that they dispose of such businesses, but merely imposes the same tax on income derived therefrom as is borne by their competitors" (H.R. Rep. 2319, *supra*, at 37).

b. During the ensuing years, uncertainty arose as to whether the unrelated business income tax extended to profits derived by tax-exempt organizations from the solicitation and sale of advertising space in their publications. See Lehrfeld, *The Unfairness Doctrine: Commercial Advertising Profits as Unrelated Business Income*, 23 Tax Law. 349, 351-352 (1970). The main argument against applying the tax in these circumstances was that the journal's articles and editorial content furthered the sponsoring organization's tax-exempt goals. Since the commercial advertisements arguably were part and parcel of a single trade or business ("publishing") with

an ultimately educational end, the unrelated business income tax was said to be inapplicable. See, *e.g.*, Weithorn & Liles, *Unrelated Business Income Tax: Changes Affecting Journal Advertising Revenues*, 45 Taxes 791, 798-800 (1967).

In 1967, the Treasury issued a Proposed Regulation formally announcing its intention to "fragment" tax-exempt publications into two components—commercial advertising, the income from which would be subject to unrelated business income tax, and articles and editorial content, the income from which would remain tax-free. Prop. Reg. § 1.513-1, 32 Fed. Reg. 5993 (1967). Following receipt of public comments, the Regulation was issued in final form eight months later. 32 Fed. Reg. 17657 (1967). It has remained substantially unchanged ever since.

Articulating the "fragmentation" concept, the new Regulation set forth the general rule that income-producing activities "do not lose identity as [a] trade or business merely because they are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization." Treas. Reg. § 1.513-1(b), 32 Fed. Reg. 17657. "Thus," the Regulation explained, "activities of soliciting, selling, and publishing commercial advertising do not lose identity as [a] trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to [its] exempt purposes" (*ibid.*).

To illustrate this principle, the Treasury set forth a pair of examples, each involving a professional association ("Z") that publishes a monthly journal containing scholarly articles and commercial advertis-

ing. Treas. Reg. § 1.513-1(d)(4)(iv) (Examples 6 & 7), 32 Fed. Reg. 17659. In Example 6, Z publishes "general consumer advertising" for products like "soft drinks, automobiles, articles of apparel, and home appliances." The Treasury concluded that such advertising revenues represented "gross income from [an] unrelated trade or business" (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 6)). In Example 7, the facts are the same as in Example 6, "except that the advertising in Z's journal promotes only products within the general area of professional interest of its members." Example 7 elaborated the hypothetical facts as follows:

> Following a practice common among taxable magazines which publish advertising, Z requires its advertising to comply with certain general standards of taste, fairness, and accuracy; but within those limits the form, content, and manner of presentation of the advertising messages are governed by the basic objective of the advertisers to promote the sale of the advertised products. While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products and differs in no essential respect from the informational function of any commercial advertising. Like taxable publishers of advertising, Z accepts advertising only from those who are willing to pay its prescribed rates.

Acknowledging that "continuing education of its members * * * is one of the purposes for which Z is granted exemption," the Treasury nevertheless concluded that "the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind

contemplated by the exemption statute." Treas. Reg. § 1.513-1(d)(4)(iv) (Example 7). Thus, "Z's publication of advertising does not contribute importantly to the accomplishment of its exempt purposes; and the income which it derives from advertising constitutes gross income from unrelated trade or business" (*ibid.*).

c. The new Regulation triggered a storm of protest from tax-exempt publishers. During 1968, Congressmen sympathetic to their interests introduced numerous bills to block the Regulation's implementation. See Lehrfeld, *supra*, at 364-365; Weithorn & Liles, *supra*, at 792 n.8. These initiatives were unsuccessful. Extensive hearings were then held, attended by spokesmen for both the exempt and the non-exempt press. See *Tax Reform, 1969: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *House Hearings*]; *Tax Reform Act of 1969: Hearings on H.R. 13270 Before the Senate Comm. on Finance*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Senate Hearings*]. Tax-exempt publishers of medical journals were well represented.[4] The witnesses repeatedly characterized the challenged Regulation as establishing a "presumption" or a "per se rule" that professional journal advertising income is subject to unrelated business income tax.[5] Those op-

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[4] See, *e.g.*, *House Hearings* 1259 (American Medical Ass'n); *id.* at 1211 (American Dental Ass'n); *id.* at 1117 (American Psychiatric Ass'n); *id.* at 1110 (American College of Physicians, respondent here).

[5] See, *e.g.*, *House Hearings* 928 (Regulation "indicate[s] that advertising is unrelated per se to an exempt purpose"); *id.* at 1113 (Regulation is "designed * * * to preclude even the possibility" that advertising income could escape tax); *id.* at 1188 ("all advertising in an organization publication is

posing the Regulation argued that the Treasury lacked statutory authority to "fragment" publishing activity and to treat commercial advertising as a "trade or business" distinct from the journal's editorial content. See, *e.g.*, *House Hearings* 1111, 1128-1129, 1184, 1213. And they contended that product advertising furthered their associations' tax-exempt purposes, *e.g.*, by educating doctors about new pharmaceutical products.[6] The non-exempt press, on the other hand, defended the Regulation as a check upon the perceived inequity and anti-competitive effect of affording a tax subsidy to their tax-exempt counterparts. See, *e.g.*, *House Hearings* 1150-1152, 1176-1177.

d. In the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 *et seq.*, Congress resolved the controversy by endorsing the Regulation and paving the way for its enforcement. Congress added to the Code new Section 513(c), entitled "Advertising, Etc., Activities." It provides that the term "trade or business" includes any activity "carried on for the production of income," and that "an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other en-

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now taxable"); *id.* at 1192 (Regulation effects "blanket taxation of all advertising"); *id.* at 1268 (Regulation creates a "presumption regarding advertising"); *Senate Hearings* 1670 ("all advertising is to be considered unrelated"); *id.* at 1705 (Regulation establishes "conclusive presumption * * * that all advertising [is] taxable").

[6] See, *e.g.*, *House Hearings* 1111-1112 (American College of Physicians); *id.* at 1119-1120 (American Psychiatric Ass'n); *id.* at 1214 (American Dental Ass'n); *id.* at 1261 (American Medical Ass'n).

deavors which may, or may not, be related to the exempt purposes of the organization." Those words, expressly sanctioning "fragmentation" of an activity into exempt-purpose and unrelated-business components, were taken almost verbatim from the 1967 Treasury Regulation promulgated to deal with the commercial advertising problem. Compare I.R.C. § 513(c) with Treas. Reg. § 1.513-1(b), 32 Fed. Reg. 17657 (1967).

The legislative history accompanying Section 513 (c) plainly shows that Congress intended to codify the treatment of advertising income prescribed by the 1967 Regulation. The Treasury Department took the position before Congress that the bill "codifies previously existing Treasury regulations defining activities such as advertising, which will be treated as unrelated business." *Senate Hearings* 568 (testimony of Assistant Secretary for Tax Policy Edwin S. Cohen); Staff of Senate Comm. on Finance, 91st Cong., 1st Sess., *Tax Reform Act of 1969 H.R. 13270: Technical Memorandum of Treasury Position* 34 (Comm. Print 1969). The House Report recites that the 1967 Regulation had "mainly affected the advertising income of publications such as medical journals," and stated that "[y]our committee wants to make clear that such regulations are valid." H.R. Rep. 91-413, 91st Cong., 1st Sess. Pt. 1, at 44 (1969). The Report then explains the new Section 513(c) as follows (*id.* at 50):

> Because of the ensuing controversy over this problem your committee has decided to deal with this subject by legislation. In general, it is in agreement with the purpose of the regulations. Your committee believes that a business competing with taxpaying organizations should not be

> granted an unfair competitive advantage by operating tax free unless the business contributes importantly to the exempt function. It has concluded that by this standard, advertising in a journal published by an exempt organization is not related to the organization's exempt functions, and therefore it believes that this income should be taxed.

The Senate Report is equally explicit. It notes the controversy over the 1967 Regulation and continues as follows (S. Rep. 91-552, 91st Cong., 1st Sess. 75 (1969)):

> The committee agrees with the House that the regulations reached an appropriate result in specifying that when an exempt organization carries on an advertising business in competition with other taxpaying advertising businesses, it should pay a tax on the advertising income. The statutory language on which the regulations are based, however, is sufficiently unclear so that substantial litigation could result from these regulations. For this reason, the committee agrees with the House that the regulations, insofar as they apply to advertising and related activities, should be placed in the tax laws.

The Report goes on to summarize the language of new Section 513(c), and concludes: "Under this provision, advertising income from publications (whether or not the publications are related to the exempt purpose of the organization) is to constitute unrelated business income to the extent it exceeds the expenses related to advertising" (S. Rep. 91-552, *supra*, at 75). The Treasury was directed to "prescribe regulations indicating the appropriate methods for allo-

cating income and expenses" as between taxable product advertising and tax-exempt editorial content (*id.* at 76).[7]

2. Surveying this legislative history, the court of appeals concluded that Congress in 1969 laid down no "blanket rule" (App., *infra*, 12a) about commercial advertising in tax-exempt professional journals. The court believed, rather, that Congress had left the door ajar and consigned to the courts a case-by-case, ad-by-ad determination as to whether *some* advertisements in *some* journals are "substantially re-

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[7] Those regulations were issued six years later. 40 Fed. Reg. 58637 (1975). They provide generally that "[u]nder section 513 * * * and § 1.513-1, amounts realized by an exempt organization from the sale of advertising in a periodical constitute gross income from an unrelated trade or business." Treas. Reg. § 1.512(a)-1(f)(1). They then set forth detailed allocation rules for advertising income and expenses. Treas. Reg. § 1.512(a)-1(f)(2) through (7).

As both the Senate Report and the commentators predicted, the 1967 Regulation did generate "substantial litigation" (S. Rep. 91-552, *supra*, at 75) concerning its application to tax years antedating Congress's enactment of Section 513(c). Indeed, two courts declared the Regulation invalid as applied to pre-1970 tax years, reasoning that the Treasury previously lacked statutory authority to "fragment" publishing activity into taxable and tax-exempt components. See *Massachusetts Medical Soc'y* v. *United States*, 514 F.2d 153, 154 (1st Cir. 1975); *American College of Physicians* v. *United States*, 530 F.2d 930, 933 (Ct. Cl. 1976). In so holding, the Court of Claims recognized that Congress in 1969 "prospectively amended [Section 513] to validate the 1967 regulations," and it accordingly limited its decision to tax years before the effective date of that enactment (530 F.2d at 930-931 n.2). The taxpayer in the First Circuit case—like respondent, a tax-exempt publisher of a medical journal—"acknowledge[d] that its advertising activities [came] within the new regulations' definition of an unrelated trade or business" (514 F.2d at 154).

lated" to the publisher's exempt purpose and are thus immune from tax (see App., *infra*, 13a, 19a & n.23). In overturning the Claims Court's findings, moreover, the court of appeals implied that the advertising in *Annals* is somehow distinguishable from the common run of advertising that does fall within the area of Congress's attention and concern.

The court of appeals erred in each step of its analysis. To begin with, Congress in 1969 quite plainly did adopt a presumption or "blanket rule" that commercial advertising income of professional journals is subject to tax. The 1967 Treasury Regulation, which Congress explicitly approved and determined to "place[ ] in the tax laws" (S. Rep. 91-552, *supra*, at 75), was uniformly interpreted, both by the witnesses who testified against it [8] and by leading commentators, as creating a presumption to that effect.[9] Indeed, the Regulation unequivocally states that "the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute." Treas. Reg. § 1.513-1(d)(4)(iv) (Example 7). And Congress made clear that, under the statutory standard it was adopting,

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[8] See pages 13-14 note 5, *supra*.

[9] See, *e.g.*, Lehrfeld, *supra*, at 355 ("*per se* rule"); Weithorn & Liles, *supra*, at 806 ("*all* journal advertising constitutes unrelated business") (emphasis in original); Moore, *Current Problems of Exempt Organizations*, 24 Tax L. Rev. 469, 475 (1969) ("the regulations take the position that all advertising revenues of journals of tax-exempt organizations constitute a separate trade or business"); Middleditch & Webster, *The new unrelated business income Regs: what they mean; how to cope with them*, 28 J. Tax. 174, 175 (Mar. 1968) ("Under the new Regulations, all advertising in an organization publication is now taxable").

"advertising in a journal published by an exempt organization is not related to the organization's exempt functions, and therefore * * * this income should be taxed" (H.R. Rep. 91-413 Pt. 1, *supra*, at 50). Although the presumption Congress enacted may admit of exceptions,[10] Congress plainly intended that the exceptions would be rare indeed.[11]

Secondly, there is no suggestion anywhere in Section 513(c) or its legislative history that Congress intended the courts to confer ad hoc immunity from the unrelated business income tax depending on their subjective, case-by-case evaluation of how "importantly" particular advertisments contribute to a tax-exempt publisher's goals. The Regulations do provide that whether an activity is "substantially related" to an exempt purpose generally "depends in

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[10] The chief exception recognized by the Treasury Department concerns advertising published in a student-run campus newspaper, where "solicitation, sale, and publication of the advertising are conducted by students, under the supervision and instruction of the university." Treas. Reg. § 1.513-1(d)(4)(iv) (Example 5). The Example concludes that, under these circumstances, publication of the advertising contributes importantly to the university's educational goals "by means of student instruction of other students in the * * * advertising activities and student participation in those activities." See also Rev. Rul. 76-93, 1976-1 C.B. 170 (recognizing exception for advertisement which contains no commercial message but merely lists a company's name, along with the names of 59 other corporate "patrons," on a single page).

[11] As one commentator put it (rather ironically, as it turns out): "[I]t is arguable [after the enactment of Section 513(c)] that there can still be 'related' advertising. However, the legislative history and intent of the Congress is so clear that the likelihood of this argument prevailing as to any period after December 31, 1969 is very improbable." Webster, *Unrelated Business Income*, 23 Tax Law. 471, 476 (1970).

each case upon the facts and circumstances involved" (Treas. Reg. § 1.513-1(d)(2)). However, Congress and the Treasury Department have definitively undertaken this calculus with respect to professional journal advertising activities in particular, and have determined, as a matter of law, that "the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute" (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 7)). There is simply no room for courts to second-guess that determination by purporting to "find facts," and thereby defeat the very uniformity and even-handedness of tax treatment that Congress sought to achieve.

Finally, the court of appeals erred in thinking that the advertising in *Annals* is somehow different from the common run of advertising that Congress clearly intended to tax. To the contrary, the pharmaceutical product advertising involved here was at the core of the problem Congress addressed in 1969. Far from being exceptional, respondent's advertising is of the garden-variety commercial type and it vies successfully in the marketplace for advertisers' dollars. The court of appeals did not disturb the Claims Court's findings that "[t]he advertising * * * was typical commercial publicity" (App., *infra*, 28a) and that "[t]he advertising business of *Annals* was operated in material respects like the advertising business of any other publication" (*id.* at 33a). Respondent's ads, like those held taxable in the Regulation Congress approved, are "designed and selected in the manner of ordinary commercial advertising" and their "informational function * * * is incidental to the controlling aim of stimulating demand for the

advertised products" (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 7)). Indeed, the Court of Claims found on an earlier occasion that "*Annals* regularly competes for advertising income with commercially published medical journals which, because of their non-exempt status, must in some instances charge higher rates than [respondent]." *American College of Physicians* v. *United States*, 530 F.2d at 931.

Contrary to the court of appeals' belief, moreover, it makes no difference that respondent's advertisements are "screened with respect to subject matter [and] accuracy" (App., *infra*, 17a) or that they "served to apprise internists of developments in their field" (*id.* at 19a). The advertisements described in the Regulation are also screened to ensure that they "comply with certain general standards of taste, fairness, and accuracy," and those advertisements also relate exclusively to "products * * * within the general area of professional interest of [the association's] members" (Treas. Reg. § 1.513-1(d)(4)(iv) (Example 7)). Indeed, the Regulation makes clear that "professional interest" advertising, for products like drugs and medical devices, and "general consumer advertising," for products like soft drinks, automobiles, and appliances, are to be treated exactly the same way for purposes of the unrelated business income tax. Compare *id.* (Example 6) with *id.* (Example 7).[12] The Regulation thus recognizes the sim-

[12] See also Staff of Joint Comm. on Internal Revenue Taxation, 91st Cong., 1st Sess., *Summary of Problems Included in Tax Reform Hearings Dealing with Tax-Exempt Organizations* 4 (Comm. Print 1969) ("The advertising income is subject to tax under the existing regulations whether or not the advertising is with respect to a product which itself may be related to the exempt activity of the organization involved").

ple reality that, to the extent the advertiser is charged a fee as a condition of publication of the advertisement, the message is that of the advertiser rather than one to which the journal would choose to devote its own, general resources. A long line of this Court's decisions confirms that interpretive rulings by the Treasury, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979) (quoting *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973)). And here the Regulation not only implements the congressional mandate but was specifically endorsed by Congress when it enacted the mandate in question.

In sum, the decision below invalidates sub silentio a Treasury Regulation that, having been explicitly approved by Congress, the court of appeals apparently did not dare invalidate in terms. In permitting respondent to operate its commercial advertising venture tax-free while its business rivals must pay tax, the court of appeals has adopted a controlling legal standard that flies in the face of Congress's design to achieve parity of treatment between exempt and non-exempt entities that publish advertisements for profit.

3. The question presented has considerable administrative importance. The reasoning of the decision below would apparently apply to virtually every tax-exempt professional or trade journal in the country. Associations of lawyers, chemists, engineers, computer programmers, and water pollution experts, no less than of doctors, can plausibly contend that their members' professional competency is enhanced by updated information contained in advertisements for

new products and services. According to *Folio: 400/1982*, a publishing industry compilation, there were in 1981 some 5,730 trade journals in the country, earning about $2.8 billion in revenues, the bulk of which came from advertising. Although it is difficult to tell how many of these journals currently are published by tax-exempt organizations, estimates before Congress in 1969 put the number at 700, with gross advertising revenues of about $110 million. Weithorn & Liles, *supra*, at 791. Those numbers can be expected to have grown since. According to postal service statistics, some 150 million pounds of commercial advertising were contained in exempt organization publications mailed during 1982 using special second class postage rates. U.S. Postal Service, *Revenue, Pieces and Weight* (1982).

The revenue impact of the decision below would likewise be substantial. Tax-exempt publishing is a big business. Of the 400 largest magazines in the Nation in 1981, at least 45 were published by tax-exempt organizations. In the medical field alone, they include the *Journal of the American Medical Association* (with 1983 advertising revenues of $14,207,000); the *New England Journal of Medicine* (with 1983 advertising revenues of $12,000,000); *American Medical News* (with 1983 advertising revenues of $8,497,000); and respondent's *Annals of Internal Medicine* (with 1983 advertising revenues of $4,637,000). See *Folio: 400/1984*, at 57, 60, 65. Indeed, the IRS estimates (based on industry sources) that between 20% and 25% of all commercial advertising in the medical field is published in exempt organization periodicals. The IRS advises that there are either currently pending or closed within the last two years some 200 examinations of advertising in exempt organization periodicals, in

which tax deficiencies totalling $29.6 million have been proposed. The Service estimates that almost half its total collections from the unrelated business income tax are attributable to revenues from commercial advertising in professional and trade journals.

Aside from the revenue impact, the decision below would impose formidable burdens on IRS audit resources. Under the (heretofore unquestioned) regulatory presumption that commercial advertising is taxable, IRS examiners were not required to investigate the "educational" function of advertisements on a case-by-case basis; the agent's task was simply to identify the ad as being for a *commercial* product or service. Under the decision below, by contrast, IRS agents will apparently have to determine, on a case-by-case, ad-by-ad basis, which commercial advertisements "contribute importantly" to the publisher's exempt function and which do not.[13] As a witness testified before Congress in 1969, "[t]o draw the line on an individual basis * * * and to say that this is advertising which is unrelated and that [that is] advertising [which] is related would present to the IRS[,] and taxpayers generally, an almost insurmountable audit problem." *House Hearings* 1184

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[13] The court of appeals, for example, highlighted an advertisement placed in *Annals* for *Medical Economics* (App., *infra*, 60a), a magazine that offers financial and tax advice to doctors, and suggested that it would not qualify as "substantially related" to the College's exempt function. See *id.* at 19a & n.23. But would the same be said about an advertisement placed by an interior decorating firm that specializes in doctors' offices? And does a drug advertisement serve an educational purpose when the product is widely known and has been available (say) for 15 years? The IRS advises that the amount of time required to audit tax-exempt publishers might increase by as much as 50% by the need to answer questions like these.

(American Society of Association Executives). The existing Treasury approach, by establishing a general rule that commercial advertising is unrelated to exempt purposes, produces logical tax consequences and prevents journals from manipulating the tax outcome simply by advising their advertisers to insert incidental "educational" boilerplate in their ads. The court of appeals has discarded that analysis and has provided no workable standard to take its place.

Finally, the question presented is important because the unrelated business income tax has a significant regulatory function. Congress designed the tax, not just to raise money, but to keep the commercial endeavors of exempt and non-exempt competitors on a par. The decision below has flouted that sharply-defined legislative policy.

4. The decision below is the first by a court of appeals to consider the question presented here. The Court of Appeals for the Federal Circuit, however, is a court of nationwide jurisdiction. Any taxpayer, regardless of where he is domiciled or does business, can have his case heard in the Claims Court, with review in the Federal Circuit, simply by paying the contested tax and suing for a refund. 28 U.S.C. 1491. In the future, therefore, any solvent, well-advised taxpayer affected by this issue will unquestionably opt for the same venue as did respondent.[14] Unless

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[14] We are aware of three cases now pending in trial courts outside the Federal Circuit that raise the question presented here. There is no assurance, however, that any of these cases will reach a court of appeals. Indeed, our trial counsel in one of the cases (*American Medical Ass'n v. United States*, Civ. No. 82-C-7213 (N.D. Ill. 1982)) has been informed that the taxpayer plans to move for a voluntary dismissal under Fed. R. Civ. P. 41(a), a plan obviously motivated by the decision below. *In Florida Trucking Ass'n* v. *Commissioner*,

this Court grants certiorari, therefore, the decision below will in all likelihood prescribe the governing legal standard on the subject. We believe that the court's error is too important, both to Congress and to the IRS, to permit that to happen.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1985

No. 4884-84 (T.C. 1984), the "relatedness" issue involves only $3,225 in tax and may well wash out at the trial level; and in *American Academy of Family Physicians* v. *United States*, Civ. No. 84-0170-CV-W-4 (W.D. Mo. 1984), which is currently in settlement negotiations, the "relatedness" issue involves only $18,000 in tax and is dwarfed by numerous other issues in the case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-715

THE AMERICAN COLLEGE OF PHYSICIANS, APPELLANT

v.

THE UNITED STATES, APPELLEE

Decided: September 17, 1984

Before BALDWIN, SMITH, and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*

In this federal income tax case, appellant American College of Physicians (College) appeals from a judgment of the United States Claims Court [1] holding the College is not entitled to the refund of taxes paid on income earned from sales of advertising space in the College's journal, *Annals of Internal Medicine* (*Annals*). We reverse.

Issue

The sole question presented in this appeal is one of first impression for this court: whether the reve-

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[1] *American College of Physicians* v. *United States*, 3 Cl. Ct. 531 (1983).

nues derived by the College from advertising in *Annals* constitute "unrelated business taxable income" derived from a trade or business the conduct of which is not substantially related to the exercise or performance by the College of its tax-exempt purposes or functions. This appeal involves the College's tax liability for the 1975 tax year.

Background

The College is an organization exempt from federal income taxation under 26 U.S.C. §§ 501(a) and 501(c)(3). Among its tax-exempt purposes are[2] "(1) to uphold and to maintain high standards in medical education, medical practice [and medical research]; (2) to encourage research, especially in clinical medicine, and (3) to foster measures for the prevention of disease and for the improvement of public health." Membership in the College is limited to members of the medical profession engaged in practice, teaching, research, or other pursuits in the field of internal medicine or in allied or related specialties.

Annals, a highly regarded medical journal in the field of internal medicine, is published by the College in furtherance of its tax-exempt purposes. *Annals* contains scholarly articles relevant to the practice of internal medicine, advertisements relating only to medical products, supplies, and equipment useful in the practice of internal medicine, and notices of positions, desired or available, in connection with the practice of internal medicine. *Annals* is available to members of the College as a benefit of membership

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[2] These purposes, *inter alia*, are set forth in the College's Articles of Incorporation.

and to nonmembers at a per issue price or by subscription. Circulation in 1975 was roughly 73,000.

Advertisements in *Annals* are "stacked" in two sections—at the front of, and behind, the editorial content—of each issue. Advertisements in medical journals published by commercial organizations are generally also grouped in stacks, rather than dispersed throughout an issue. The trial judge found that many of the ads appearing in *Annals* were identical to those appearing in medical journals published by nonexempt organizations. He also found that the advertising business of *Annals* was operated in material respects like the advertising business of any other publication.

Advertisements appearing in *Annals* were prepared by the advertisers and not by the College. The trial court found that the college did not use the advertising in *Annals* to provide its readers a comprehensive or systematic presentation of the goods or services publicized. Advertising space was made available in *Annals* at rates competitive with those charged by commercial organizations for advertising space in their medical journals.

The College has a long-standing policy of accepting only those advertisements relating to medical products (primarily drugs), supplies, and equipment useful in the practice of internal medicine and those classified advertisements of positions in connection with the practice of internal medicine. Proffered advertisements are screened for accuracy and relevance to internal medicine.

1975 Advertising Revenues.

In 1975, gross advertising income attributable to *Annals* was $1,376,322. Direct advertising costs were

$833,050. Circulation income and readership costs attributable to *Annals* in 1975 were $1,057,754 and $1,351,167, respectively. Another publication of the College, the *Bulletin*, produced an overall loss of $96,471. The College timely reported taxable income of $153,388 and paid federal income taxes of $55,965 on that income for the 1975 tax year.

Proceedings Below.

On or about June 12, 1979, the College filed with the Internal Revenue Service a timely claim for refund of these taxes. Failing to receive notice of disallowance of this claim, receipt of which was not waived, the College, on or about August 17, 1982, filed in the United States Claims Court suit for refund of the taxes. The trial court found that the advertising published in *Annals* is not substantially related to the College's exempt purposes nor is it published primarily for the convenience of the College's members. Accordingly, the revenues derived from advertising in *Annals* were held to be taxable. The College appeals.

The trial court's findings of fact are not to be set aside unless they are clearly erroneous. The legal conclusions of the trial court will not be set aside unless they are incorrect as a matter of law.[3]

Unrelated Business Taxable Income

The Internal Revenue Code provided at the relevant time, with certain exceptions not applicable here, that the income derived from the unrelated business

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[3] Fed. R. Civ. P. 52(a); *Heisig* v. *United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983).

of an organization which is exempt from taxation under 26 U.S.C. § 501(a) (1976) is taxable: [4]

> There is hereby imposed for each taxable year on the unrelated business taxable income (as defined in section 512) of every organization described in paragraph (2) a normal tax and a surtax computed as provided in section 11. In making such computation for purposes of this section, the term "taxable income" as used in section 11 shall be read as "unrelated business taxable income".

The College is an organization described in paragraph (2)—an organization exempt from taxation under 26 U.S.C. § 501(a) not eligible for certain exceptions. Section 512(a)(1) of title 26 of the United States Code provides:

> [T]he term "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business * * *.

Section 513 provides: [5]

> The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of

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[4] 26 U.S.C. § 511(a)(1) (1976).

[5] 26 U.S.C. § 513(a) (1976).

> the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 * * * except that such term does not include any trade or business—
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> * * * * *
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> (2) which is carried on, in the case of an organization described in section 501(c)(3) * * * by the organization primarily for the convenience of its members * * *[.]

The definition provided in section 513 is explained by Treas. Reg. § 1.513-1(a) (1976):

> [U]nless one of the specific exceptions of section 512 or 513 is applicable, gross income of an exempt organization subject to the tax imposed by section 511 is includible in the computation of unrelated business taxable income if: (1) It is income from trade or business; (2) such trade or business is regularly carried on by the organization; and (3) the conduct of such trade or business is not substantially related (other than through the production of funds) to the organization's performance of its exempt functions.

There is no dispute in this case that the advertising income is from a trade or business that is regularly carried on. Thus, the only remaining issues are whether that activity is not substantially related to an exempt purpose or function of the organization, and, in any event, whether the advertising does not constitute an "unrelated trade or business" because it is covered by the exception of section 513(a)(2) as a trade or business which is carried on by the or-

ganization primarily for the convenience of its members.

"Substantially Related" Standard

The relevant Treasury regulations outline the analysis required under the "substantially related" element of section 513: [6]

> The presence of this requirement necessitates an examination of the relationship between the business activities which generate the particular income in question—the activities, that is, of producing or distributing the goods or performing the services involved—and the accomplishment of the organization's exempt purposes.

The regulations proceed to delimit the type of relationship required: [7]

> Trade or business is "related" to exempt purposes, in the relevant sense, only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income); and it is "substantially related," for purposes of section 513, only if the causal relationship is a substantial one. Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to purposes for which exemption is granted, the production or distribution of the goods or the performance of the services from which the

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[6] Treas. Reg. § 1.513-1(d)(1) (1976).

[7] Treas. Reg. § 1.513-1(d)(2) (1976).

> gross income is derived must contribute importantly to the accomplishment of those purposes. Where the production or distribution of the goods or the performance of the services does not contribute importantly to the accomplishment of the exempt purposes of an organization, the income from the sale of the goods or the performance of the services does not derive from the conduct of related trade or business. Whether activities productive of gross income contribute importantly to the accomplishment of any purpose for which an organization is granted exemption depends in each case upon the facts and circumstances involved.

Further, the regulations provide that [8]

> [i]n determining whether activities contribute importantly to the accomplishment of an exempt purpose, the size and extent of the activities involved must be considered in relation to the nature and extent of the exempt function which they purport to serve. Thus, where income is realized by an exempt organization from activities which are in part related to the performance of its exempt functions, but which are conducted on a larger scale than is reasonably necessary for performance of such functions, the gross income attributable to that portion of the activities in excess of the needs of exempt functions constitutes gross income from the conduct of unrelated trade or business. Such income is not derived from the production or distribution of goods or the performance of services which con-

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[8] Treas. Reg. § 1.513-1(d)(3) (1976).

> tribute importantly to the accomplishment of any exempt purpose of the organization.

Development of Section 513

Prior to 1950, the test for whether income received by a tax-exempt organization was taxable was the destination of those funds, not their source.[9] The predecessor provisions to sections 511-513 were promulgated in response to the abuse of tax-exempt status by certain tax-exempt organizations which were operating unrelated commercial enterprises purely as a source of revenue.[10]

The evils sought to be remedied by that legislation were specific and limited, although at the time the problem was spiraling. The First Circuit, in *Massachusetts Medical Society* v. *United States*, noted that [11]

> [i]n his message to Congress in 1950 President Truman sought legislation to correct "the few glaring abuses of the tax exemption privilege," stating that it had been "misused in a few instances to gain competitive advantage over private enterprise through the conduct of business and industrial operations entirely unrelated to educational activities." * * *

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[9] *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, 581 (1924).

[10] *See C. F. Mueller Co.* v. *Commissioner*, 190 F.2d 120 (3d Cir. 1951).

[11] *Massachusetts Medical Soc'y* v. *United States*, 514 F.2d 153, 154 (1st Cir. 1975) (quoting *Hearings on Revenue Revision Before the House Committee on Ways and Means*, 81st Cong., 2d Sess. 4, 5 (1950)). *See also* H.R. REP. No. 2319, 81st Cong., 2d Sess. 36-37 (1950), S. REP. No. 2375, 81st Cong., 2d Sess. 29, 107 (1950).

Similarly, the Court of Claims, in addressing whether advertising in *Annals* was taxable during a different tax year, stated [12]

> [t]he 1950 Act was a fairly limited measure, designed to distinguish the customary activities of exempt organizations from the operation of independent business enterprises entirely unrelated to the educational purpose of the organization. The publication of advertising in tax-exempt educational journals was a well-established practice before 1950, and Congress did not intend to treat such advertising on a par with an independently run advertisement placement agency.

Prior to 1967, the Commissioner took no steps to tax the advertising income of professional journals of tax-exempt organizations. In that year, the Treasury amended its regulations to provide that commercial advertising does not lose its identity as a trade or business "even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization." [13] Hence, Treasury adopted a fragmentary definition of trade or business.

The First Circuit in *Massachusetts Medical Society*,[14] and the Court of Claims, in *American College of Physicians*,[15] rejected the fragmentary approach,

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[12] *American College of Physicians* v. *United States*, 530 F.2d 930, 933 (Ct. Cl. 1976) (resolved on grounds other than substantial relation of the activity to an exempt purpose).

[13] Treas. Reg. § 1.513-1(b) (1968).

[14] *Massachusetts Medical Soc'y*, 514 F.2d 153.

[15] *American College of Physicians*, 530 F.2d 930 (following reasoning of First Circuit in *Massachusetts Medical Soc'y*).

however, as inconsistent with the legislative history, with the treatment of deductions in the regulations, and with section 512(a) of the code, in favor of treatment of the integrated publication of a periodical as a "trade or business." In *American College of Physicians*,[16] the court did not reach the sole issue before us:

> Since we view as dispositive the issue of whether plaintiff's advertising activities, as a matter of law, constituted a "trade or business" for tax purposes—irrespective of whether the advertisements themselves are or are not substantially related to plaintiff's exempt purpose—we find it unnecessary to resolve this essentially factual dispute.

In the interim before the regulations were declared invalid, however, Congress enacted the Tax Reform Act of 1969 amending section 513.

Effect of Tax Reform Act of 1969 on Section 513.

The Government asserts that the enactment of section 513 pursuant to the Tax Reform Act of 1969 reflects a congressional intent to tax advertising revenues as an unrelated trade or business. Subsection (c) was added to section 513:[17]

> (c) Advertising, etc., activities
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> For purposes of this section, the term "trade or business" includes any activity which is carried on for the production of income from the sale

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[16] *American College of Physicians*, 530 F.2d at 931 n.3.

[17] 26 U.S.C. § 513(c) (1976).

> of goods or the performance of services. For purposes of the preceding sentence, an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Where an activity carried on for profit constitutes an unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

The Government avers that Congress expressly validated the regulations that were held invalid in *Massachusetts Medical Society* and in *American College of Physicians*. The Government, quite properly, recognizes that congressional action was not in response to the above cases.[18] Rather, the Government asserts that it reflects a broader policy decision to tax organizations such as the College. We disagree.

The Government relies on statements of the House Ways and Means Committee to the effect that it was anticipated that advertising income from a journal published by an exempt organization would constitute unrelated business income.[19] While the committee may have believed that advertising income should be taxed, it did not adopt a blanket rule. Rather, it

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[18] The Government recognizes that the cases were decided subsequent to amendment of the code by the Tax Reform Act of 1969 and involved tax years prior to the effective date of the amendment.

[19] H.R. REP. No. 413, 91st Cong., 1st Sess. at 50, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 1645, 1695-96. *See also* S. REP. No. 552, 91st Cong., 1st Sess. at 75-76, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 1645, 2104-05.

expressly preserved the exemption for those trade or business activities that contribute importantly to the exempt function. The legislative history addresses advertising generally and does not grapple with specific factual situations. Congress heard testimony that medical advertising in journals such as *Annals* is substantially related to the exempt purposes of organizations such as the College, yet, Congress made no change to the "substantial relation" or "convenience" tests of section 513(a). Instead, it amended the statute *only* to provide that advertising activity shall be treated as a separate trade or business for purposes of analysis.

The Government's reliance on *HCSC-Laundry* v. *United States*[20] is unavailing. That case held that a cooperative hospital service organization cannot qualify for tax-exempt status under section 501(c)(3) but, instead, may qualify only under section 501(e). The laundry was previously held exempt under section 501(c)(3)[21] which was unchanged by the addition of section 501(e).

Section 501(e), however, provided exact guidance in the treatment of cooperative service organizations and, in so doing, omitted any specific exemption for shared laundry organizations. In *HCSC-Laundry*, the specific provision, subsection (e), was held to control over the more general, subsection (c)(3), particularly in view of their interrelationship.

A different section of the code is involved in this case. Section 513(c) is not a "more specific" pro-

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[20] *HCSC-Laundry* v. *United States*, 450 U.S. 1 (1981).

[21] *Northern Cal. Cent. Servs., Inc.* v. *United States*, 591 F.2d 620 (Ct. Cl. 1979) (holding that despite enactment of § 501(e), a cooperative hospital laundry remained a § 501(c)(3) exempt organization—a position expressly rejected in *HCSC-Laundry*).

vision which governs the "more general" section 513 (a). Rather, subsection (c) defines the trade or business to be analyzed under the substantially related test of subsection (a). Nor are we convinced of the congressional purpose asserted by the Government. We conclude that the Government has not established that Congress intended to tax *all* advertising revenues of *all* journals of exempt organizations. Even were we to agree that Congress did so intend, it failed to carry that alleged intent forward into the statute with language appropriate to effect that result.

We conclude that Congress, in enacting section 513 (c), intended for advertising activity to be treated as a separate trade or business for purposes of the unrelated business income tax provisions. Section 513(a) expressly requires that, although considered a separate trade or business, the conduct of that advertising must be evaluated to determine whether it is not substantially related to an exempt purpose or function of the organization and to determine whether the conduct of the trade or business is not primarily for the convenience of the organization's members, before that income is taxable. The trial judge undertook that analysis and we conclude that he erred.

The trial judge attempted first to determine whether the conduct of the trade or business is not substantially related to the performance of the College's tax-exempt purposes. The College maintains that the advertising performs an educational function; a suggestion the court below found unpersuasive. The trial court focused instead on the commercial character of the advertising and on the degree of similarity to advertising activity carried on by commercial organizations. While it recognized the advertis-

ing had some degree of educational content, the trial court went on to state that:

> To avoid the [unrelated business income tax,] an exempt organization would have to run its advertising business much differently than did plaintiff. For example, it might make a concerted effort to provide advertising that comprehensively surveys a particular field, includes all recent developments in that field, or otherwise makes a systematic presentation on some subject relevant to the organization's exempt purposes. To qualify for exemption, the advertising package as a whole must serve an identifiable educational objective that goes substantially beyond the informational content of the individual advertisements. This standard is not met where, as here, the comprehensiveness and content of the advertising package is entirely dependent on each manufacturer's willingness to pay for space and the imagination of its advertising agency.

The court below found any educational function of the activity to be incidental to the purpose of raising revenue.

Having found the advertising in *Annals* not substantially related to the College's exempt purposes, the trial judge proceeded to determine whether it was nevertheless carried on primarily for the convenience of the College's members in their capacity as members of the College and not merely in their capacity as physicians. He found that the advertising business was not carried on primarily for the convenience of the College's members but, rather, for the primary purpose of raising revenue.

The College argues that the court below fashioned its own test—adding requirements unsupported by

statute, legislative history, or regulation. The trial court's test, avers the College, requires a noncommercial primary purpose. The College asserts that the trial court's decision is contrary to authority, relies on the Internal Revenue Service's generalizations that journal advertising is unrelated, and fails to recognize distinguishing facts present in this case. The Government, on the other hand, asserts that the trial court's decision is consistent with both the intent of Congress and the applicable Treasury regulations.

We agree with the College that the trial court erred in imposing a more rigorous standard than is supported by the statute. The trial court did not, however, impose tax liability merely because the primary purpose was found to be to raise revenue. It relied on a variety of factors, among them the similarity to the content and conduct of advertising in commercial publications.

The commercial character of the activity is not, however, determinative. Rather, it is the substantiality of the relationship—the importance of the contribution of that activity—to the performance of the College's exempt purposes or functions, that is determinative. The trial court's analysis places too great an emphasis on the similarity of the activity to commercial advertising. Sections 511-513 impose tax liability for revenues derived from activities that are not sufficiently related to the exempt purpose or function of the organization; not by virtue of the commercial character of that activity.

The exempt purpose or function urged by the College was the medical education of internists including, but not limited to, dissemination of medical and pharmaceutical information. The College's expert

witnesses testified regarding the need for continuing pharmacologic information, particularly in view of the rapid pace of developments in internal medicine. Testimony was also elicited regarding the essential function performed by drug advertising to disseminate information on recent developments with respect to new drugs, changes in dosage forms and strengths of existing drugs, and additional indications and contraindications discovered based on use. Finally, the College's experts testified that the advertising performed an essential "alerting" function to inform the physician of recent developments by disseminating information concerning those developments.

The trial court recognized that "all advertising is educational or informational to some degree." The College introduced evidence that the advertising carried in *Annals* is screened with respect to subject matter and its content controlled. Advertising is accepted only of products and services related to the practice of internal medicine. The accuracy of information in the advertisements appearing in *Annals* is regulated, in part by information mandated by the Food and Drug Administration. Further, the College screens new advertisements for relevance to the practice of internal medicine. Similarly, classified advertising in *Annals* is limited to advertisements directly relevant to the practice of internal medicine. The advertisements are also indexed by advertiser.

The trial court erred in requiring the activity to meet a standard higher than set out in the statute. We conclude the trial court erred in requiring that "[t]o qualify for exemption, the advertising package as a whole must serve an identifiable educational objective that goes substantially beyond the informa-

tional content of the individual advertisements." The trial court was apparently distracted by the commercial character of the advertisements and failed to focus properly on the substantiality of the relation of the information content of the advertisements to the College's educational function.

Comprehensive and systematic presentation of various aspects of the goods or services advertised, as the trial court would require, would doubtless enhance the strength of the relationship between the information content of the advertisements and the College's educational function. The failure to present the information in that manner, however, does not establish the lack of an important contribution to the exempt function of the advertisements that were published in *Annals*. While new advertisements could be considered of greater educational value than old, repeated ads, the trial court failed to examine the contribution of the old, repeated ads to the educational function. Similarly, systematic presentation of advertisements on some subject relevant to the College's educational function would doubtless further that educational purpose. However, the failure of the College to take additional steps that may have resulted in a more substantial relation to the exempt purpose does not establish that the content of the advertisements is not already substantially related to that purpose.

It was not necessary, in order to resolve the issue before it, for the trial court to find that the primary purpose of the advertising activity was to raise revenue. That finding is relevant only inferentially in that, if its primary purpose was commercial, the advertising business was not carried on *primarily* for the convenience of the College's members. The record presents a very close question, but we cannot con-

clude, on the basis of the record before us, that the trial court's finding, that the advertising was not carried on "primarily for the convenience of [the College's] members," is clearly erroneous. That the primary purpose may have been commercial, however, does not preclude a finding that the activity is substantially related to an exempt function.

We conclude that the trial court's finding, that the advertising in *Annals* is not substantially related to the College's tax-exempt, educational purpose, was clearly erroneous. While the educational function of the advertising may well have been secondary to the purpose of raising revenues, the evidence of record establishes that the advertising in *Annals* fulfilled an important educational function. The advertisements served to apprise internists of developments in their field. The trial court made no finding that the size and extent of the activity was excessive. On the basis of the evidence of record, the size and extent of the advertising activity appears to be reasonable in relation to the editorial content of *Annals*.[22]

The evidence of record establishes that the contribution of the advertisements to the exempt purpose is an important one. We hold that the sales of advertising in *Annals* are substantially related to the exempt purpose of the College to educate internists and, therefore, are not taxable under section 511.

Not all the advertisements that were published in *Annals*, however, would appear to be substantially related to the exempt educational function.[23] Treasury Reg. § 1.513-1(d)(3) (1976) provides

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[22] Treas. Reg. § 1.513-1(d)(3) (1976).

[23] The trial court cited the example of an advertisement for *Medical Economics* magazine, which offers financial and business advice to the practicing physician.

> where income is realized by an exempt organization from activities which are in part related to the performance of its exempt functions, but which are conducted on a larger scale than is reasonably necessary for performance of such functions, the gross income attributable to that portion of the activities in excess of the needs of exempt functions constitutes gross income from the conduct of unrelated trade or business. * * *

The Government, however, does not argue in this appeal that some portion of the advertising in *Annals* was in excess of what would be reasonably necessary for performance of the exempt function. Accordingly, it is not necessary for us to resolve that issue in this appeal.[24]

REVERSED

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[24] *Cf. Hi-Plains Hospital* v. *United States*, 670 F.2d 528, 533 (5th Cir. 1982) (holding that hospital pharmacy sales were substantially related to exempt function and remanding case to district court to resolve treatment of small amount of sales that were not substantially related to exempt purpose).

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-715

THE AMERICAN COLLEGE OF PHYSICIANS, APPELLANT

v.

THE UNITED STATES, APPELLEE

NIES, *Circuit Judge*, concurring.

I concur in result and join the opinion except in the following respect. In my view, a portion of appellant's advertising business "is carried on . . . by the organization primarily for the convenience of its members." In particular, the advertisements for positions in the field and for services and publications directed to members in their professional capacity, including the advertisement for *Medical Economics* magazine, would fall under this exemption.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-715
415-82T

THE AMERICAN COLLEGE OF PHYSICIANS, APPELLANT

v.

THE UNITED STATES, APPELLEE

JUDGMENT

On Appeal from the U.S. Claims Court

This Cause having been heard and considered, it is Ordered and Adjudged: Reversed.

DATED September 17, 1984

Petition for Rehearing,
Denied, December 5, 1984
Suggestion for Rehearing
In Banc, Declined,
December 5, 1984.

ENTERED BY
ORDER OF THE COURT

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

Issued as a Mandate: December 13, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-715

THE AMERICAN COLLEGE OF PHYSICIANS, APPELLANT

v.

THE UNITED STATES, APPELLEE

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

Date: December 5, 1984

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 415-82T

AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Filed Oct. 21, 1983]

OPINION

KOZINSKI, Chief Judge.

Plaintiff American College of Physicians, a tax-exempt organization, challenges the Commissioner's determination that income earned from advertising in the College's journal, *Annals of Internal Medicine*, is subject to the Unrelated Business Income Tax (UBIT). 26 U.S.C. §§ 511-513 (1976).

Facts [1]

The College is an organization exempt from taxation under section 501(c)(3). Its tax-exempt purposes are to uphold and maintain high standards in

[1] The court made oral findings of fact after trial which was held on September 14, 1983.

medical education, medical practice and medical research; to encourage research, especially in clinical medicine; and to foster measures for the prevention of disease and for the improvement of public health. In furtherance of its exempt purposes, the College publishes *Annals of Internal Medicine* which contains scholarly articles relevent to the practice of internal medicine. *Annals* has a worldwide reputation as one of the most respected journals in its field. The journal is provided to the College's members without charge and to nonmembers on a per issue basis or by subscription.

Each monthly issue of *Annals* contains commercial advertisements relating exclusively to medical products (primarily drugs) and classified notices relating principally to employment in the practice or teaching of medicine. These advertisements are not dispersed throughout the journal but appear in discrete "stacks" at the beginning and end of the publication. In general, the College's advertising rates are competitive with those of other medical journals.

Questions Presented

Sections 511-513 of the Internal Revenue Code provide that the income of otherwise tax-exempt organizations is taxable if it is earned by regularly conducting a trade or business not substantially related to the organization's exempt purposes. The parties have stipulated that the College's activity of soliciting and publishing advertisements in *Annals* was a regularly conducted trade or business. They disagree as to whether it is substantially related to the College's exempt purposes.

Even if publishing advertisements in *Annals* is held not to be substantially related to the College's exempt

purposes, the income is nevertheless tax-exempt if the advertisements are published primarily for the convenience of the College's members. 26 U.S.C. § 513 (a)(2) (1976). The parties further disagree as to whether the advertising in *Annals* meets this standard.

Discussion

A. *The Relatedness Issue*

Under section 513(a) the income from a trade or business is tax-exempt if the conduct of the trade or business is substantially related to the performance of the organization's tax-exempt purposes. To come within section 513, the relationship between the business and the tax-exempt purpose must be a substantial one, i.e. it must "contribute importantly" to the accomplishment of the organization's exempt purposes. Treas. Reg. § 1.513-1(d)(2) (1975).

1. Defendant argues that, to avoid the UBIT, the very conduct or operation of the business, rather than merely its product, must be substantially related to the tax-exempt purpose. To illustrate this proposition, defendant refers to an example in the regulations which concludes that income from advertisements solicited by a student-run newspaper is tax-exempt. Treas. Reg. 1.513-1(d)(4)(iv) example (5) (1975). Defendant explains that students working on the paper are engaging in an educational activity: learning how to run a newspaper. The publication of advertising teaches students how to solicit business, set prices and lay out ads. The income for the advertising is exempt, defendant argues, because the very operation of the advertising business contributes importantly to the educational function. Whether the advertisements themselves advance the organization's tax-exempt purposes is, in defendant's view, irrelevant.

While defendant's test fits neatly within the example given, it is not clear that the Commissioner has consistently followed it. *See, e.g.*, Rev. Rul. 75-516, 1975-2 C.B. 220; Rev. Rul. 69-463, 1969-2 C.B. 131; Rev. Rul. 69-267, 1969-1 C.B. 160.[2] At least until the Internal Revenue Service itself takes a position more consistent with the view suggested by its attorney, the court will consider whether the conduct *or* the product of a business is related to the organization's tax-exempt purposes.

2. Plaintiff does not contend that the conduct of the advertising business is substantially related to the College's exempt purposes, so the inquiry is whether the advertising itself is so related. Plaintiff's theory is that the advertising performs an educational function, supplementing the journal's editorial content. Medicine is a constantly changing

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[2] In Rev. Rul. 69-267, 1969-1 C.B. 160, for example, a hospital operated a gift shop patronized by patients, visitors and employees. The operation of the gift shop was held to be substantially related to the hospital's exempt purposes because "[b]y providing a facility for the purchase of merchandise and services to improve the physical comfort and mental well-being of its patients, the hospital is carrying on an activity that encourages their recovery and therefore contributes importantly to its exempt purposes." There is no indication that the gift shop was operated by patients; its relationship to the hospital's tax-exempt purpose lay in the fact that the goods and services it provided could enhance the comfort of the patients. *See also* Rev. Rul. 69-268, 1969-1 C.B. 160 (hospital cafeteria is substantially related); Rev. Rul. 69-269, 1969-1 C.B. 160 (hospital parking lot is substantially related). While each of these operations might have been deemed tax-exempt as operated primarily for the convenience of the patients, *see* pp. 5-7 *infra*, the Commissioner chose instead to rule that they were substantially related to the hospital's tax-exempt purpose.

science and the advertising contains factual and technical data which, according to plaintiff, can help physicians keep up.

The court finds plaintiff's argument unpersuasive. The evidence is clear that plaintiff did not use the advertising to provide its readers a comprehensive or systematic presentation of any aspect of the goods or services publicized.[3] Those companies willing to pay for advertising space got it; others did not. Moreover, some of the advertising was for established drugs or devices and was repeated from one month to another, undermining the suggestion that the advertising was principally designed to alert readers of recent developments.[4] Some ads even concerned matters that had no conceivable relationship to the College's tax-exempt purposes. *See, e.g.*, n. 7 *infra*.

The advertising, moreover, was typical commercial publicity. Some ads were eye-catching, others strictly factual; some covered a fraction of a page, others several pages; some were in black and white, many were in bright color. Many ads were identical to those appearing in medical journals published by non-exempt organizations. The differences between ads plainly reflected the advertiser's marketing strat-

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[3] The hit-or-miss nature of the advertising was highlighted by one of plaintiff's own witnesses who suggested that ads could help readers understand the journal's editorial content by supplementing articles discussing a particular drug or medical device. Yet it is clear that no effort was made to coordinate the advertising with the journal's editorial content. Thus, if an article discussed a particular new drug or device, it would be pure coincidence for that product also to be featured in an advertisement in the same issue of the journal.

[4] For example *Annals* often carried ads for Valium, Insulin and Maalox. *See, e.g., Annals of Internal Med.*, July 1975 at I-0, I-58 & I-64.

egy rather than their probable importance to the reader. That the advertisements were placed in stacks—a fact upon which plaintiff places significant reliance—had no bearing on their purported educational function. It suggests instead that the ads were considered distracting and out of step with the sober and understated tenor of the journal's editorial content.

All advertising is, of course, educational or informational to some degree. However, Treasury Regulations provide that advertising income of journals like *Annals* generally is taxable. Treas. Reg. § 1.512(a)-1(f) (1975). Example 7 under Treas. Reg. § 1.513-1(d)(4)(iv) closely resembles the situation here, positing a tax-exempt organization that sells advertising space in its journal but limits the advertising to matters within the professional interest of its members. The organization requires the advertising to conform to certain standards of taste, fairness and accuracy, but otherwise leaves the content and form of the advertising to the discretion of the advertisers. Despite the informational character of the advertising, the example concludes that "the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute."

To avoid the UBIT an exempt organization would have to run its advertising business much differently than did plaintiff. For example, it might make a concerted effort to provide advertising that comprehensively surveys a particular field, includes all recent developments in that field, or otherwise makes a systematic presentation on some subject relevant to the organization's exempt purposes. To qualify for

exemption, the advertising package as a whole must serve an identifiable educational objective that goes substantially beyond the informational content of the individual advertisements. This standard is not met where, as here, the comprehensiveness and content of the advertising package is entirely dependent on each manufacturer's willingness to pay for space and the imagination of its advertising agency.

The court therefore finds that the advertising in *Annals* did not contribute importantly to the College's tax-exempt purposes. Rather, any educational function it may have served was incidental to its purpose of raising revenue.

B. *The Convenience Issue*

Even though the advertising in *Annals* is not substantially related to the College's exempt purposes, the income gained from it would nevertheless be tax-exempt if the advertising business was carried on primarily for the convenience of the College's members. 26 U.S.C. § 513(a)(2) (1976).

1. There is little guidance on the subject of when income subject to the UBIT nevertheless remains tax-exempt because it derives from activities conducted primarily for the convenience of the organization's members. The statute itself simply provides that "the term 'unrelated trade or business' . . . does not include any trade or business . . . which is carried on . . . by the organization primarily for the convenience of its members . . . ." 26 U.S.C. § 513(a)(2)(1976). In order to qualify under this language, it would appear that the activity in question has to be carried on for the convenience of the organization's members in their capacity as members. Were the statute construed otherwise, there would be no end to the types of goods or services an organization could provide its

members while avoiding tax on the income so derived. This would significantly undercut the purpose of the UBIT.[5]

While the legislative history of section 513(a)(2) is sparse, it supports this interpretation. The House and Senate Reports give the examples of dining rooms, restaurants and dormitories operated by a university for use by its students as falling within this exception. H.R. Rep. No. 2319, 81st Cong., 2d Sess. 37 (1950), *reprinted in* 1950-2 C.B. 380, 409; S. Rep. 375, 81st Cong., 2d Sess. 29 (1950), *reprinted in* 1950-2 C.B. 483, 505. Each of these examples involves facilities that assist students in fulfilling their role as students. For example, dormitories allow students to live close to classrooms and libraries, and to share quarters with other students. On campus restaurants and cafeterias facilitate student interaction before, after and between classes.[6] *See also*

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[5] Thus, tax-exempt organizations could, as a side-line, operate vacation resorts, catalogue shopping services, apartment houses or any other enterprises so long as access were largely limited to members. All such enterprises could be described as operating for the convenience of the members, yet their activities would be entirely unrelated to the organization's tax-exempt purposes. Allowing organizations to engage in such enterprises tax free would raise concerns about unfair competition with taxable entities; such concerns were the principal impetus for enactment of the UBIT. *See Disabled American Veterans* v. *United States*, 227 Ct. Cl. 474, 479 (1981); H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950), *reprinted in* 1950-2 C.B. 380, 409; S. Rep. No. 2375, 81st Cong., 2d Sess. 28 (1950), *reprinted in* 1950-2 C.B. 483, 504; Treas. Reg. § 1.513-1(b) (1975).

[6] The Supreme Court has recognized that student interaction serves an important educational function. *See Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

St. Luke's Hospital v. *United States*, 494 F. Supp. 85, 92 (W.D. Mo. 1980) (pathology tests performed by hospital primarily for the convenience of member physicians).

The advertising here may have served the convenience of *Annals* readers in their capacity as physicians but not in their capacity as members of the College. The difference is subtle but important. The members' interests as members concern such matters as attending the College's educational functions, participating in research and testing, disseminating health information to the public and promoting quality medical education. The members' interests as physicians are much broader and include all of the aspects of medical practice. The advertising in *Annals* may assist practicing physicians by informing them of new products, publicizing the availability of positions and helping them sell their medical equipment. The advertising does not, however, have any connection with their responsibilities as members of the College.[7]

2. In any event, the court finds that the advertising business was not carried on *primarily* for the convenience of the College's members in any capacity. In another context, the Supreme Court has interpreted the term "primarily" to mean "'of first im-

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[7] An advertisement for another publication, *Medical Economics*, illustrates this point. The ad, which appeared regularly in *Annals*, promised that *Medical Economics* would help provide answers to such questions as whether "the new Seville [is] worth its $12,479 base price" and that it would instruct readers on how to "double [their] gain through a quirk in the tax law." *Annals of Internal Med.*, July 1975 at I-40. While such issues may be of interest to the reader, their resolution surely has no bearing on his responsibilities as a member of the College.

portance' or 'principally.'" *Malat* v. *Ridell* [sic], 383 U.S. 569, 572 (1966) (construing section 1221(1) of the Internal Revenue Code which denies capital gain treatment to "property held . . . primarily for sale . . . in the ordinary course of . . . business"). There seems to be no reason to depart from this common sense definition in interpreting section 513(a)(2).

The advertising business of *Annals* was operated in material respects like the advertising business of any other publication. All advertising serves the convenience of some of those seeing it, otherwise it would be ineffective and unprofitable. However, the primary purpose of advertising from the publisher's perspective is to make money. While the enhanced convenience of the readers may have been a welcome incidental benefit, the court finds that the College's primary purpose in carrying advertising in *Annals* was to raise revenue.

Conclusion

The advertising published in *Annals* is not substantially related to the College's exempt purposes nor is it published primarily for the convenience of the College's members.

The clerk is directed to dismiss the petition with costs to the prevailing party.

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 415-82 T

AMERICAN COLLEGE OF PHYSICIANS

v.

THE UNITED STATES

[Filed Oct. 24, 1983]

JUDGMENT

Pursuant to the opinion of October 21, 1983, it was held that plaintiff is not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, with costs to the prevailing party.

FRANK T. PEARTREE
Clerk of Court

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C.), as amended and as in effect for the years at issue:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) *Tax on Unrelated Business Income and Certain Other Activities.*—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II and III of this subchapter, but (notwithstanding parts II and III of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

(1) Corporations organized under Act of Congress, if such corporations are instrumentalities of the United States and if, under such Act, as amended and supplemented, such corporations are exempt from Federal income taxes.

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less ex-

penses, to an organization which itself is exempt under this section.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(5) Labor, agricultural, or horticultural organizations.

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures

to the benefit of any private shareholder or individual.

(7) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.

* * * * *

SEC. 511. IMPOSITION OF TAX ON UNRELATED BUSINESS INCOME OF CHARITABLE, ETC., ORGANIZATIONS.

(a) *Charitable, Etc., Organizations Taxable at Corporate Rates.*—

(1) *Imposition of tax.*—There is hereby imposed for each taxable year on the unrelated business taxable income (as defined in section 512) of every organization described in paragraph (2) a normal tax and a surtax computed as provided in section 11. In making such computation for purposes of this section, the term "taxable income" as used in section 11 shall be read as "unrelated business taxable income."

(2) *Organizations subject to tax.*—

(A) *Organizations described in section 401(a) and 501(c).*—The taxes imposed by paragraph (1) shall apply in the case of any organization (other than a trust described in subsection (b) or an organization described in section 501(c)(1)) which is exempt, except as provided in this part or part II (relating to private foundations), from tax-

ation under this subtitle by reason of section 501(a).

(B) *State colleges and universities.*—The taxes imposed by paragraph (1) shall apply in the case of any college or university which is an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions. Such taxes shall also apply in the case of any corporation wholly owned by one or more such colleges or universities.

* * * * *

SEC. 512. UNRELATED BUSINESS TAXABLE INCOME.

(a) *Definition.*—For purposes of this title—

(1) *General rule.*—Except as otherwise provided in this subsection, the term "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

* * * * *

(b) *Modifications.*—The modifications referred to subsection (a) are the following:

(1) There shall be excluded all dividends, interest, and annuities, and all deductions directly connected with such income.

(2) There shall be excluded all royalties (including overriding royalties) whether measured by production or by gross or taxable income from the property, and all deductions directly connected with such income.

(3) In the case of rents—

(A) Except as provided in subparagraph (B), there shall be excluded—

(i) all rents from real property (including property described in section 1245(a)(3)(C)), and

(ii) all rents from personal property (including for purposes of this paragraph as personal property any property described in section 1245(a)(3)(B)) leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

(B) Subparagraph (A) shall not apply—

(i) if more than 50 percent of the total rent received or accrued

under the lease is attributable to personal property described in subparagraph (A)(ii), or

(ii) if the determination of the amount of such rent depends in whole or in part on the income or profits derived by any person from the property leased (other than an amount based on a fixed percentage or percentages of receipts or sales).

(C) There shall be excluded all deductions directly connected with rents excluded under subparagraph (A).

* * * * *

SEC. 513. UNRELATED TRADE OR BUSINESS.

(a) *General Rule.*—The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 (or, in the case of an organization described in section 511(a)(2)(B), to the exercise or performance of any purpose or function described in section 501(c)(3)), except that such term does not include any trade or business—

(1) in which substantially all the work in carrying on such trade or business is

performed for the organization without compensation; or

(2) which is carried on, in the case of an organization described in section 501(c)(3) or in the case of a college or university described in section 511(a)(2)(B), by the organization primarily for the convenience of its members, students, patients, officers, or employees, or, in the case of a local association of employees described in section 501(c)(4) organized before May 27, 1969, which is the selling by the organization of items of work-related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) which is the selling of merchandise, substantially all of which has been received by the organization as gifts or contributions.

* * * * *

(c) *Advertising, Etc., Activities.*—For purposes of this section, the term "trade or business" includes any activity which is carried on for the production of income from the sale of goods or the performance of services. For purposes of the preceding sentence, an activity does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Where an activity carried on for profit constitutes an

unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.512(a)-1. *Definition.*

* * * * *

(f) *Determination of unrelated business taxable income derived from sale of advertising in exempt organization periodicals*—(1) *In general.* Under section 513 (relating to the definition of unrelated trade or business) and § 1.513-1, amounts realized by an exempt organization from the sale of advertising in a periodical constitute gross income from an unrelated trade or business activity involving the exploitation of an exempt activity, namely, the circulation and readership of the periodical developed through the production and distribution of the readership content of the periodical. Paragraph (d) of this section provides for the allowance of deductions attributable to the production and distribution of the readership content of the periodical. Thus, subject to the limitations of paragraph (d)(2) of this section, where the circulation and readership of an exempt organization periodical are utilized in connection with the sale of advertising in the periodical, expenses, depreciation, and similar items of deductions attributable to the production and distribution of the editorial or readership content of the periodical shall qualify as items of deductions directly

connected with the unrelated advertising activity. Subparagraphs (2) through (6) of this paragraph provide rules for determining the amount of unrelated business taxable income attributable to the sale of advertising in exempt organization periodicals. Subparagraph (7) of this paragraph provides rules for determining when the unrelated business taxable income of two or more exempt organization periodicals may be determined on a consolidated basis.

(2) *Computation of unrelated business taxable income attributable to sale of advertising*—(i) *Excess advertising costs.* If the direct advertising costs of an exempt organization periodical (determined under subparagraph (6)(ii) of this paragraph) exceed gross advertising income (determined under subparagraph (3)(ii) of this paragraph), such excess shall be allowable as a deduction in determining unrelated business taxable income from any unrelated trade or business activity carried on by the organization.

* * * * *

(3) *Income attributable to exempt organization periodicals*—(i) *In general.* For purposes of this paragraph the total income attributable to any exempt organization periodical is the sum of its gross advertising income and is circulation income.

(ii) *Gross advertising income.* The term "gross advertising income" means all amounts derived from the unrelated advertising activities of an exempt organization periodical (or for purposes of this paragraph in the case of a taxable organization, all amounts derived from the

advertising activities of the taxable organization).

* * * * *

See subparagraph (4) of this paragraph for a discussion of the factors to be considered in determining allocable membership receipts of an exempt organization periodical under the standard described in the preceding sentence.

* * * * *

§ 1.513-1. *Definition of unrelated trade or business.*

(a) *In general.* As used in section 512 the term "unrelated business taxable income" means the gross income derived by an organization from any unrelated trade or business regularly carried on by it, less the deductions and subject to the modifications provided in section 512. Section 513 specifies with certain exceptions that the phrase "unrelated trade or business" means, in the case of an organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 * * *. * * * Therefore, unless one of the specific exceptions of section 512 or 513 is applicable, gross income of an exempt organization subject to the tax imposed by section 511 is includible in the computation of unrelated business taxable income if: (1) It is income from trade or business; (2) such trade or business is regularly

carried on by the organization; and (3) the conduct of such trade or business is not substantially related (other than through the production of funds) to the organization's performance of its exempt functions.

(b) *Trade or business.* The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete. On the other hand, where an activity does not possess the characteristics of a trade or business within the meaning of section 162, such as when an organization sends out low-cost articles incidental to the solicitation of charitable contributions, the unrelated business income tax does not apply since the organization is not in competition with taxable organizations. However, in general, any activity of a section 511 organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute "trade or business" within the meaning of section 162—and which, in addition, is not substantially related to the performance of exempt functions—presents sufficient likelihood of unfair competition to be within the policy of the tax. Accordingly, for purposes of section 513 the term "trade or business" has the same meaning it has in section 162, and generally includes any activity carried on for the production of income from the sale of goods or performance of services. Thus, the term "trade or business" in section 513 is not limited to integrated aggre-

gates of assets, activities and good will which comprise businesses for the purposes of certain other provisions of the Internal Revenue Code. Activities of producing or distributing goods or performing services from which a particular amount of gross income is derived do not lose identity as trade or business merely because they are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Thus, for example, the regular sale of pharmaceutical supplies to the general public by a hospital pharmacy does not lose identity as trade or business merely because the pharmacy also furnishes supplies to the hospital and patients of the hospital in accordance with its exempt purposes or in compliance with the terms of section 513(a)(2). Similarly, activities of soliciting, selling, and publishing commercial advertising do not lose identity as a trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization. However, where an activity carried on for the production of income constitutes an unrelated trade or business, no part of such trade or business shall be excluded from such classification merely because it does not result in profit.

(c) *Regularly carried on*—(1) *General principles.* In determining whether trade or business from which a particular amount of gross income derives is "regularly carried on," within the meaning of section 512, regard must be had

to the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued. This requirement must be applied in light of the purpose of the unrelated business income tax to place exempt organization business activities upon the same tax basis as the nonexempt business endeavors with which they compete. Hence, for example, specific business activities of an exempt organization will ordinarily be deemed to be "regularly carried on" if they manifest a frequency and continuity, and are pursued in a manner, generally similar to comparable commercial activities of nonexempt organizations.

* * * * *

(d) *Substantially related*—(1) *In general.* Gross income derives from "unrelated trade or business," within the meaning of section 513(a), if the conduct of the trade or business which produces the income is not substantially related (other than through the production of funds) to the purposes for which exemption is granted. The presence of this requirement necessitates an examination of the relationship between the business activities which generate the particular income in question—the activities, that is, of producing or distributing the goods or performing the service involved—and the accomplishment of the organization's exempt purposes.

(2) *Type of relationship required.* Trade or business is "related" to exempt purposes, in the relevant sense, only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income); and it is

"substantially related," for purposes of section 513, only if the causal relationship is a substantial one. Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to purposes for which exemption is granted, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of those purposes. Where the production or distribution of the goods or the performance of the services does not contribute importantly to the accomplishment of the exempt purposes of an organization, the income from the sale of the goods or the performance of the services does not derive from the conduct of related trade or business. Whether activities productive of gross income contribute importantly to the accomplishment of any purpose for which an organization is granted exemption depends in each case upon the facts and circumstances involved.

* * * * *

(4) *Application of principles*—(i) *Income from performance of exempt functions.* Gross income derived from charges for the performance of exempt functions does not constitute gross income from the conduct of unrelated trade or business. The following examples illustrate the application of this principle:

Example (1). M, an organization described in section 501(c)(3), operates a school for training children in the performing arts, such as acting, singing, and dancing. It presents performances by its students and derives gross income

from admission charges for the performances. The students' participation in performances before audiences is an essential part of their training. Since the income realized from the performance derives from activities which contribute importantly to the accomplishment of M's exempt purposes, it does not constitute gross income from unrelated trade or business. (For specific exclusion applicable in certain cases of contributed services, see section 513(a)(1) and paragraph (e)(1) of this section.)

Example (2). N is a trade union qualified for exemption under section 501(c)(5). To improve the trade skills of its members, N conducts refresher training courses and supplies handbooks and technical manuals. N receives payments from its members for these services and materials. However, the development and improvement of the skills of its members is one of the purposes for which exemption is granted N; and the activities described contribute importantly to that purpose. Therefore, the income derived from these activities does not constitute gross income from unrelated trade or business.

Example (3). O is an industry trade association qualified for exemption under section 501(c)(6). It presents a trade show in which members of its industry join in an exhibition of industry products. O derives income from charges made to exhibitors for exhibit space and admission fees charged patrons or viewers of the show. The show is not a sales facility for individual exhibitors; its purpose is the promotion and stimulation of interest in, and demand for, the industry's products in general, and it is con-

ducted in a manner reasonably calculated to achieve that purpose. The stimulation of demand for the industry's products in general is one of the purposes for which exemption is granted O. Consequently, the activities productive of O's gross income from the show—that is, the promotion, organization and conduct of the exhibition—contribute importantly to the achievement of an exempt purpose, and the income does not constitute gross income from unrelated trade or business.

* * * * *

(iv) *Exploitation of exempt functions.* In certain cases, activities carried on by an organization in the performance of exempt functions may generate good will or other intangibles which are capable of being exploited in commercial endeavors. Where an organization exploits such an intangible in commercial activities, the mere fact that the resultant income depends in part upon an exempt function of the organization does not make it gross income from related trade or business. In such cases, unless the commercial activities themselves contribute importantly to the accomplishment of an exempt purpose, the income which they produce is gross income from the conduct of unrelated trade or business. The application of this subdivision is illustrated in the following examples:

* * * * *

Example (5). Y, an exempt university, provides facilities, instruction and faculty supervision for a campus newspaper operated by its students. In addition to news items and editorial

commentary, the newspaper publishes paid advertising. The solicitation, sale, and publication of the advertising are conducted by students, under the supervision and instruction of the university. Although the services rendered to advertisers are of a commercial character, the advertising business contributes importantly to the university's educational program through the training of the students involved. Hence, none of the income derived from publication of the newspaper constitutes gross income from unrelated trade or business. The same result would follow even though the newspaper is published by a separately incorporated section 501(c)(3) organization, qualified under the university rules for recognition of student activities, and even though such organization utilizes its own facilities and is independent of faculty supervision, but carries out its educational purposes by means of student instruction of other students in the editorial and advertising activities and student participation in those activities.

Example (6). Z is an association exempt under section 501(c)(6), formed to advance the interests of a particular profession and drawing its membership from the members of that profession. Z publishes a monthly journal containing articles and other editorial material which contribute importantly to the accomplishment of purposes for which exemption is granted the organization. Income from the sale of subscriptions to members and others in accordance with the organization's exempt purposes, therefore, does not constitute gross income from unrelated trade or business. In connection with the publi-

cation of the journal, Z also derives income from the regular sale of space and services for general consumer advertising, including advertising of such products as soft drinks, automobiles, articles of apparel, and home appliances. Neither the publication of such advertisements nor the performance of services for such commercial advertisers contributes importantly to the accomplishment of any purpose for which exemption is granted. Therefore, notwithstanding the fact that the production of income from advertising utilizes the circulation developed and maintained in performance of exempt functions, such income is gross income from unrelated trade or business.

Example (7). The facts are as described in the preceding example, except that the advertising in Z's journal promotes only products which are within the general area of professional interest of its members. Following a practice common among taxable magazines which publish advertiisng, Z requires its advertising to comply with certain general standards of taste, fairness, and accuracy; but within those limits the form, content, and manner of presentation of the advertising messages are governed by the basic objective of the advertisers to promote the sale of the advertised products. While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products and differs in no essential respect from the informational function of any commercial advertising. Like taxable publishers of advertising, Z accepts advertising only from those who are willing to pay its prescribed

rates. Although continuing education of its members in matters pertaining to their profession is one of the purposes for which Z is granted exemption, the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute; it differs fundamentally from such an activity both in its governing objective and in its method. Accordingly, Z's publication of advertising does not contribute importantly to the accomplishment of its exempt purposes; and the income which it derives from advertising constitutes gross income from unrelated trade or business.

(e) *Exceptions.* Section 513(a) specifically states that the term "unrelated trade or business" does not include—

(1) Any trade or business in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or

(2) Any trade or business carried on by an organization described in section 501(c)(3) or by a governmental college or university described in section 511(a)(2)(B), primarily for the convenience of its members, students, patients, officers, or employees; or, any trade or business carried on by a local association of employees described in section 501(c)(4) organized before May 27, 1969, which consists of the selling by the organization of items of work-related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) Any trade or business which consists of selling merchandise, substantially all of which has been received by the organization as gifts or contributions.

An example of the operation of the first of the exceptions mentioned above would be an exempt orphanage operating a retail store and selling to the general public, where substantially all the work in carrying on such business is performed for the organization by volunteers without compensation. An example of the first part of the second exception, relating to an organization described in section 501(c)(3) or a governmental college or university described in section 511 (a)(2)(B), would be a laundry operated by a college for the purpose of laundering dormitory linens and the clothing of students. The latter part of the second exception, dealing with certain sales by local employee associations, will not apply to sales of these items at locations other than the usual place of employment of the employees; therefore sales at such other locations will continue to be treated as unrelated trade or business. The third exception applies to so-called "thrift shops" operated by a tax-exempt organization where those desiring to benefit such organization contribute old clothes, books, furniture, et cetera, to be sold to the general public with the proceeds going to the exempt organization.

* * * * *

APPENDIX G

The advertisements reproduced on the following pages appeared in the January 1975 issue of *Annals of Internal Medicine* (at pages I39, I41, and I48-I49, respectively), and in the February 1975 issue of *Annals of Internal Medicine* (at pages I31, I33, I53, and I86, respectively).

EDITOR'S NOTE

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Introduction of Insulin in the United States by Lilly

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Insulin	U-20	1923
Insulin	U-40	1925
Insulin	U-80	1925
Regular Insulin	U-80	1926
Protamine Zinc Insulin	U-40	1937
Protamine Zinc Insulin	U-80	1938
NPH Insulin	U-40	1950
NPH Insulin	U-80	1950
Regular Insulin	U-500	1952
Lente® Insulin	U-40	1954
Lente® Insulin	U-80	1954
Semilente® Insulin	U-40	1957
Semilente® Insulin	U-80	1957
Ultralente® Insulin	U-40	1957
Ultralente® Insulin	U-80	1957
Regular Insulin	U-100	1973
NPH Insulin	U-100	1973
Protamine Zinc Insulin	U-100	1973
Lente® Insulin	U-100	1973
Semilente® Insulin	U-100	1973
Ultralente® Insulin	U-100	1973

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First among the acceptable categories of classified advertisements are those by physicians seeking positions, by government or private organizations seeking physician employees or by individual physicians seeking associates. Other acceptable categories include announcements of post-graduate courses and symposia, and advertisements of practices for sale, medical facilities for rent or sale, medical equipment and apparatus for sale, medical employment bureau advertising, academic posts to be filled, available posts for interns and residents, and medical books and journals wanted or for sale.

CLASSIFIED ADVERTISING RATES

Personal, Non-Display, Advertising:
Minimum number of lines - 3
(42 characters per line - this includes spaces and each punctuation mark)
Rate per line, **one time** - $4.00
Rate per line, **two times** - $3.85
Rate per line, **three times** - $3.70
Rate per line, **four through seven times** - $3.60
BOX NUMBER - $1.50 per insertion
PAYMENT - Do not send check with order. We will submit an invoice.

***NOTE:** Special layouts may require additional charges (unless camera ready copy is provided).

Commercial, Display, Advertising:
Minimum number of column inches - 1 (approx. 10 lines per inch)
3 column page - 13 picas each column
Rate per column inch, **one time** - $60.00 (plus $6.00 ea. add. line)
Rate per column inch, **two times** - $55.00 (plus $6.00 ea. add. line)
Rate per column inch, **three to five times** - $50 (plus $5.50 ea. add. line)
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INTERNISTS—40 Physicians multispecialty clinic seeks 2 Internists with specialty training in gastroenterology and pulmonary diseases. Salary two years, then partnership. Contact Medical Director, Billings Clinic, Box 2555, Billings, Montana 59103. P6Ja2x

CARDIOLOGIST: 35, Asst. Prof. Med., ABIM, Expertise Intensive Care/Cardiac Cath. Desires position Med. School, Affiliated Hospital or Academic Group. Address: Box 174, AIM. P11Ja2z

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The NYC Dept. of Health seeks a capable administrator to assume the responsibility of Assistant Commissioner for Communicable & Chronic Disease Services.
Requirements encompass at least 5 years of full time paid experience as an administrator in a comparable medical program plus NYS license to practice medicine. A masters degree in public health may be substituted for as much as 2 years of the required experience.
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NEPHROLOGY FELLOWSHIP - available in University affiliated 850 bed teaching Veterans Administration Hospital located in the San Fernando Valley, CA. Program offers good exposure to broad spectrum of problems in clinical nephrology, hemodialysis and teaching seminars. Research elective during second year. Salary $19600. Nondiscrimination in employment. Write to Chief Medical Service, Box 172, AIM. P8Ja2x

GASTROENTEROLOGIST, 32, A.B.I.M., univ. trained in all endoscopic procedures with additional liver disease experience. Seeks hospital based or group practice in So. Calif. or Ariz. Available July, '75. Box 173, AIM. P10Ja6x

NEPHROLOGIST-INTERNIST, ABIM, Univ. trained in Clinical Nephrology, dialysis, transplantation, seeks assn., partnership or hospital based practice. Available July 1975. Box 177, AIM. P16Ja1x

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INTERNIST WANTED-board cert./elig. to join 5 other internists in 18-man multispecialty group in Central Wyoming community of 45,000 with large referral area. Subspecialty interest desirable. Exciting opportunity to practice subspecialty and general internal medicine-and enjoy the outdoor life. Reply with curriculum vitae to: Box 175, AIM. P13Ja3x

INTERNIST-CHEST PHYSICIAN, 29, ABIM cert., trained in fiberoptic bronchoscopy, intensive resp. care, & pulm. func. test. Available July 1975. Box 178, AIM. P18Ja1x

DIRECTOR OF MEDICAL EDUCATION for 500-bed community teaching hospital, coastal city on Great Lakes. Center approved for training in wide range of clinical specialties. Hospital has educational atmosphere with interested educational coordinators in each clinical dept. Applicant will be challenged to develop a top-notch organization-wide program. Good educational background, knowledge of med. education techniques, interest in all fields of med., a high degree of communications skills, and a managerial attitude required. Minimum related experience acceptable. Substantial salary with growth potential plus good benefit program. Send C.V. in confidence to Arthur A. Lepinot, Hosp. & Med. Planning, Inc., 702 Abbott Rd., East Lansing, Mi 48823. P25Ja1x

INTERNIST-GASTROENT., 34, Univ. trained, board eligible. Recently finished G.I. fellowship. Extensive experience in endoscopy. Seeks group practice in New England, S.F., or Mpls. Box 179, AIM. P19Ja1x

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PULMONARY: 2 hospital-based pulmonary physicians seek associate in university affiliated community hospital with Pulmonary Fellowship Program. Liberal starting salary leading to partnership. Oceanside living. Forward CV to Arthur F. Gelb, M.D., or Robert Lugliani, M.D., Pulmonary Disease Institute, a medical group, 1045 Atlantic Avenue, Suite 902, Long Beach, CA 90813. P23Ja3x

MEDICAL ONCOLOGIST. Multispecialty Group in midwest seeks to expand Oncology Dept. Interested parties send CV to Box 183, AIM. P24Ja1x

GASTROENTEROLOGIST, ABIM, all Univ. trained, Extensive endoscopy and motility exper. Avail. July, 75. Seek hospital-based or group practice in Northeast. Box 184, AIM. P26Ja1x

GASTROENTEROLOGIST, 31, ABIM, univ. trained, exper. endoscopy, colonoscopy, desires GI position Wash., D.C. area., N.Y., N.J., Conn., Fla. only. Available 7/75. Box 180, AIM P20Ja1x

GENERAL INTERNIST, university-trained, age 30, board eligible, military service completed, seeks position with small group for July, 1975. Southern New England or Northeast preferred. Write Box 181, AIM. P21Ja2x

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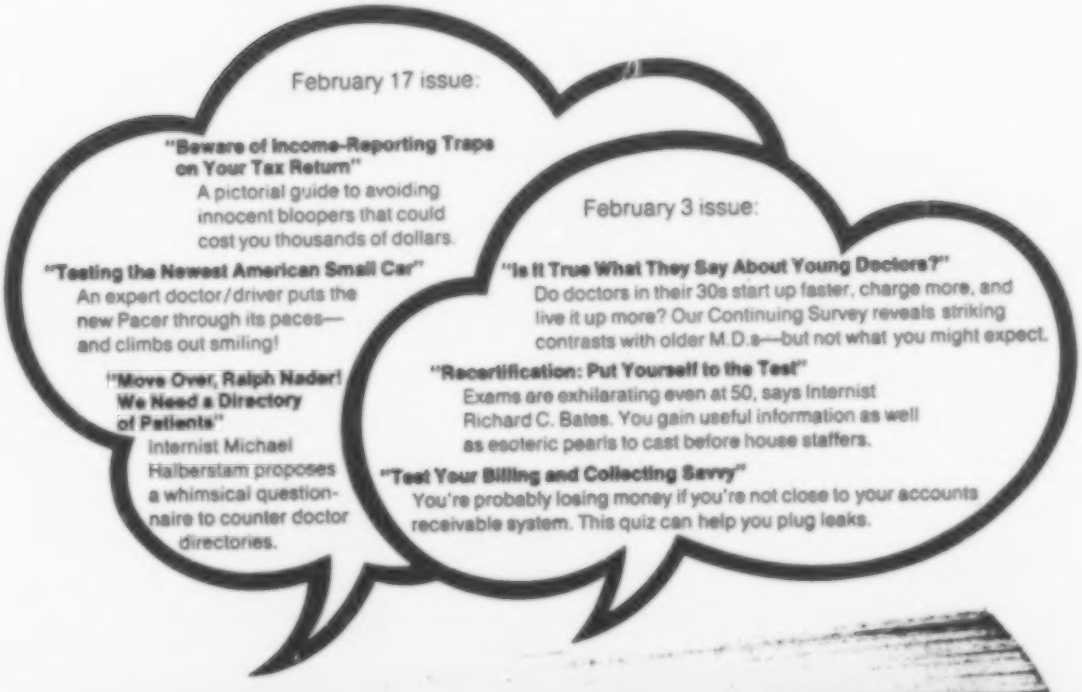
Listed below you'll find a few articles we think you won't want to miss in the next several issues of Medical Economics.

These articles, like others in our magazine, are designed to help you with the nonclinical aspects of your practice.


February 17 issue:
"Beware of Income-Reporting Traps on Your Tax Return"
A pictorial guide to avoiding innocent bloopers that could cost you thousands of dollars.
"Testing the Newest American Small Car"
An expert doctor/driver puts the new Pacer through its paces—and climbs out smiling!
"Move Over, Ralph Nader! We Need a Directory of Patients"
Internist Michael Halberstam proposes a whimsical questionnaire to counter doctor directories.
February 3 issue:
"Is It True What They Say About Young Doctors?"
Do doctors in their 30s start up faster, charge more, and live it up more? Our Continuing Survey reveals striking contrasts with older M.D.s—but not what you might expect.
"Recertification: Put Yourself to the Test"
Exams are exhilarating even at 50, says Internist Richard C. Bates. You gain useful information as well as esoteric pearls to cast before house staffers.
"Test Your Billing and Collecting Savvy"
You're probably losing money if you're not close to your accounts receivable system. This quiz can help you plug leaks.

in potassium therapy

Kato is a Natural

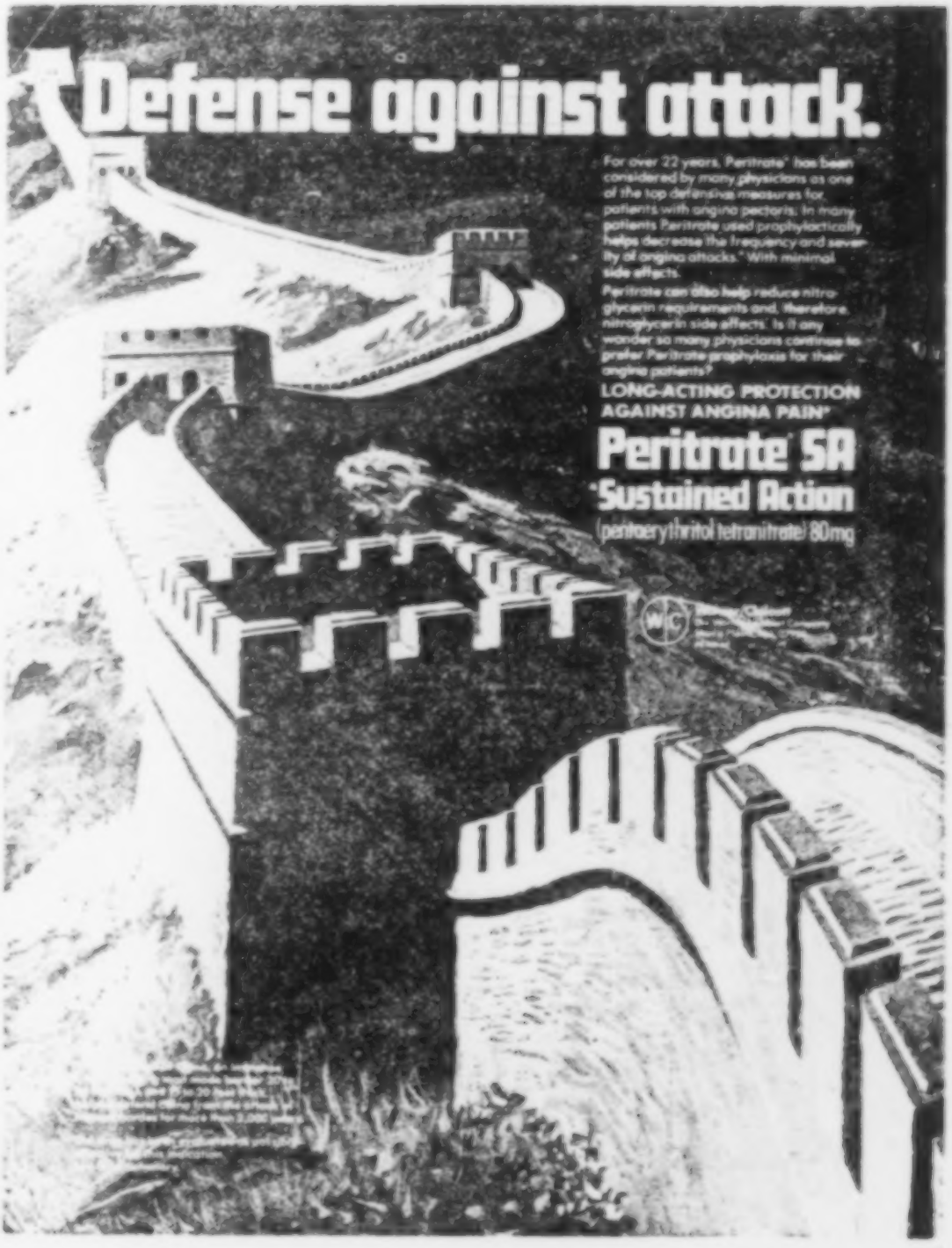
Kato Powder is KCl blended with natural tomato powder and subtle spices. Mixed with a mere 2 ounces of cold water, it provides a dose of potassium chloride in a good tasting low sodium tomato juice drink. Refreshingly different. Patients take it and like it!

Beautiful Medicine
For mild varicosities, leg pain, and fatigue—they work as great as they look.
Controlled graduated compression—a special knit for greater support at foot and ankle, with gradually less support higher up on the calf.
No tourniquet-like band—socks stay up because leg-easy stretch gives great fit and comfort.
Medically correct design—helps prevent edema, reduces venous pooling of blood.
Lasting quality for economy—available at pharmacies everywhere.
Recommend
PARKE-DAVIS
ELASTIC SUPPORT HOSIERY FOR MEN
Because all support hosiery is not alike
Parke, Davis & Company, Detroit, Michigan 48232

Darvocet-N 100
Lilly

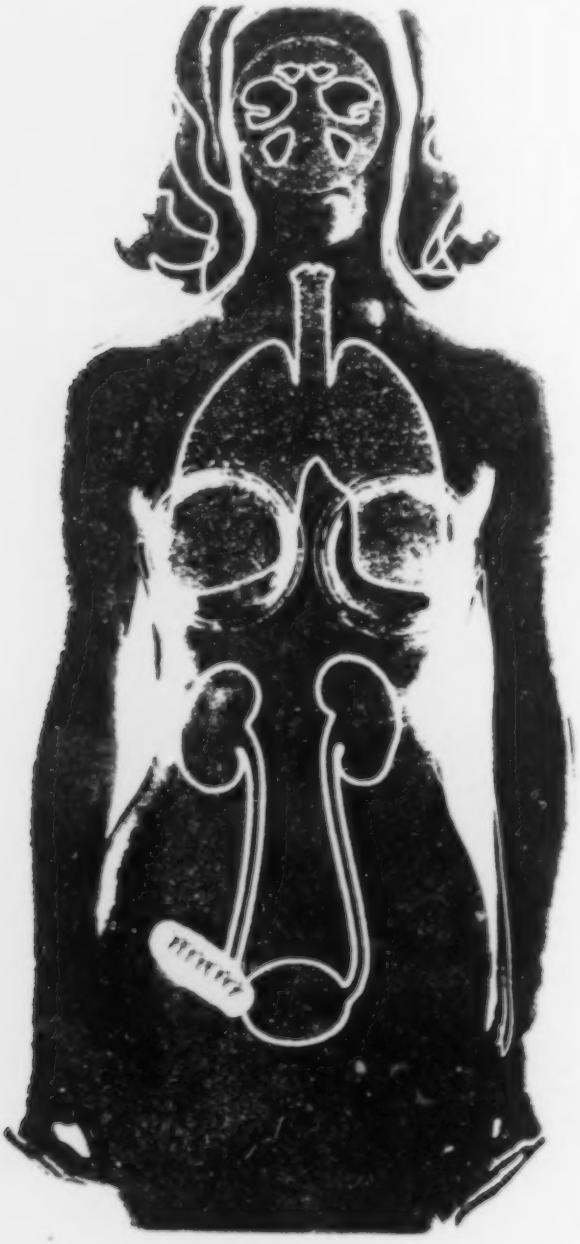
APPENDIX H

The advertisements reproduced on the following pages appeared in the February 1975 issue of *Annals of Internal Medicine* (at pages I59, I50, and I46-I47, respectively).


Defense against attack.
For over 22 years, Peritrate® has been considered by many physicians as one of the top defensive measures for patients with angina pectoris. In many patients Peritrate used prophylactically helps decrease the frequency and severity of angina attacks.* With minimal side effects.
Peritrate can also help reduce nitroglycerin requirements and, therefore, nitroglycerin side effects. Is it any wonder so many physicians continue to prefer Peritrate prophylaxis for their angina patients?
LONG-ACTING PROTECTION AGAINST ANGINA PAIN*
Peritrate® SA
*Sustained Action
(pentaerythritol tetranitrate) 80mg

New
from
SK&F

ANSPOR
BRAND OF
CEPHRADINE
capsules: 250 and 500 mg
for oral suspension: 125 and 250 mg./5 ml.



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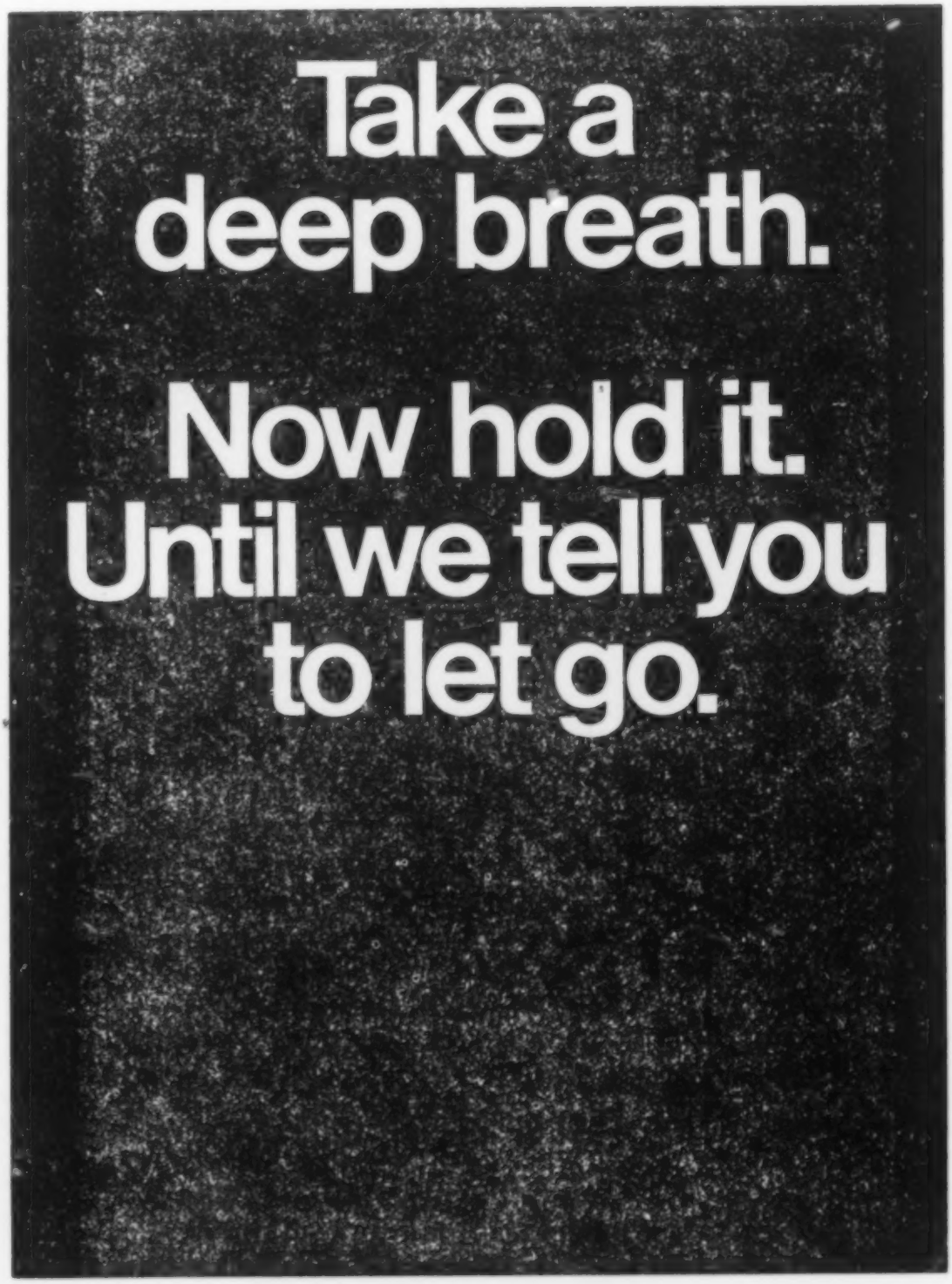
Take a
deep breath.
Now hold it.
Until we tell you
to let go.

"This sensation of air hunger [has] both intensity and quality...the length of time that the breath can be held depends upon P_{CO_2}, P_{O_2}, pH, lung volume, level of physical activity, prior hyperventilation, level of CO_2 acclimatization (tolerance), motivation and self discipline."*

Okay. Exhale.

You've just experienced air hunger. It is only an intimation of what your patients with reversible bronchospasm may experience. You rarely think about breathing. They rarely stop thinking about it.

Alupent® (metaproterenol sulfate). It can help take your bronchial asthmatic's mind off his lungs by relieving reversible bronchospasm.

Alupent. The first single-entity bronchodilator effective in both tablet and aerosol dosage form.

Alupent®
(metaproterenol sulfate)
Tablets and Metered Dose Inhaler

Please see next page for brief summary of the prescribing information

*Slonim, N. Balfour and Hamilton, Lyle H., *Respiratory Physiology*, St. Louis, The C.V. Mosby Company, 1971, ed 2, pp 136-137

A83

APPENDIX I

The advertisements reproduced on the following pages appeared in the February 1975 issue of *The American Journal of Medicine* (at pages A85, A108, and A40-A41 respectively). *The American Journal of Medicine* is published by a division of Dun and Bradstreet, a taxable commercial publisher.

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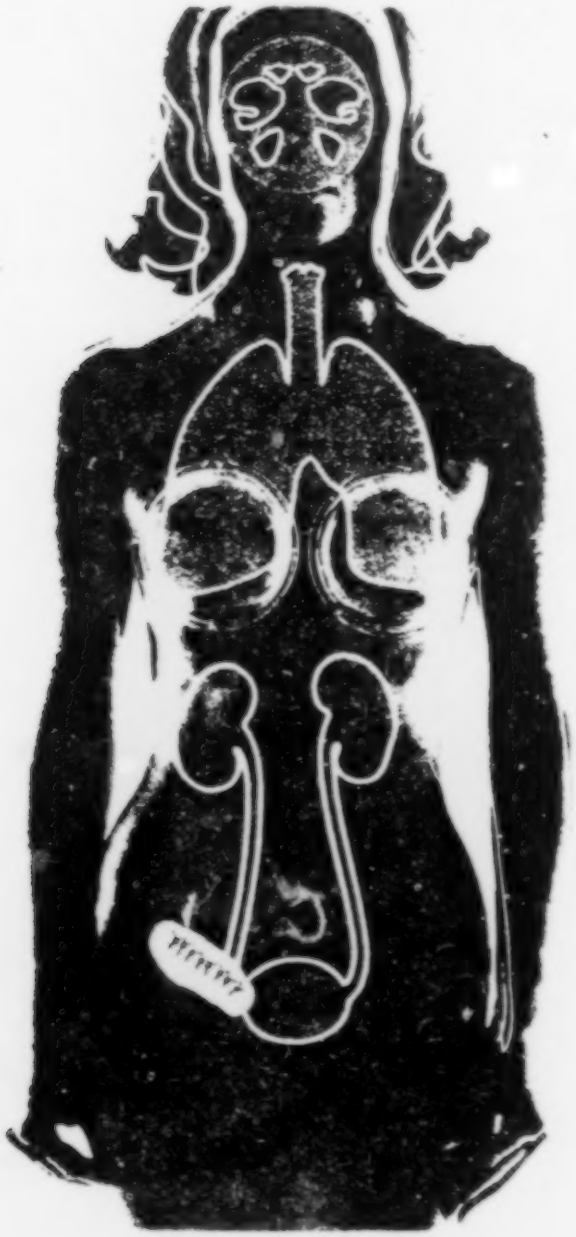
BRAND OF

CEPHRADINE

capsules: 250 and 500 mg.
for oral suspension: 125 and 250 mg./5 ml.



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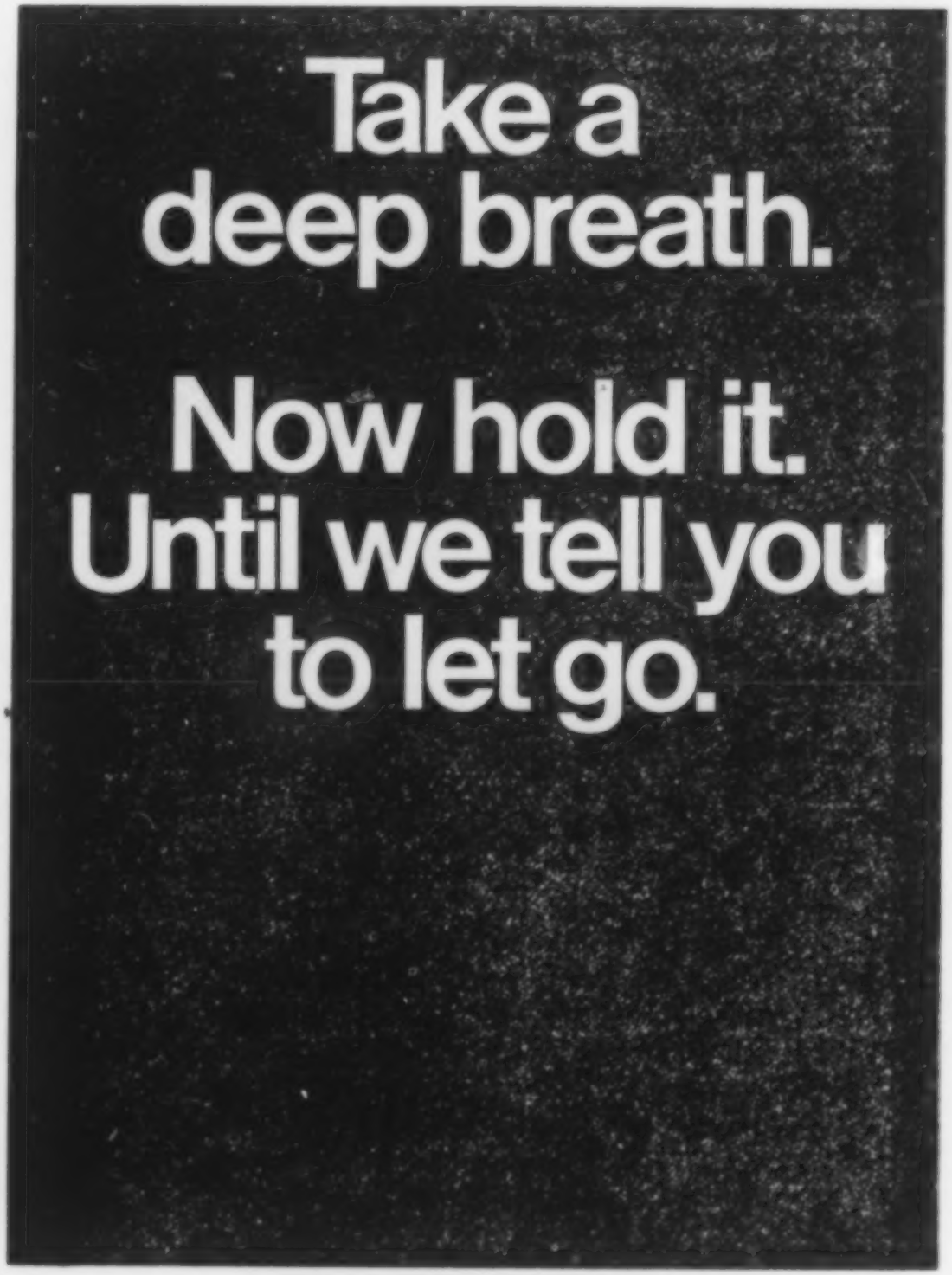
& FRENCH
LABORATORIES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